Supreme Court, U. S.
FILED
NOV 6 1978
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-749

COMMONWEALTH OF KENTUCKY - - Petitioner

versus

HAROLD WHORTON - - - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

ROBERT F. STEPHENS
Attorney General

PATRICK B. KIMBERLIN, III
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Counsel for Petitioner

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provisions	2
Statement of the Case and the Facts	2– 4
Reasons for Granting the Writ	4–11
Conclusion	11
Proof of Service	12
Appendix	13–45
Opinions of the Supreme Court of Kentucky	13–37
Mandate of the Supreme Court of Kentucky	38
Petition for Rehearing and Modification	39–45

TABLE OF CASES AND AUTHORITIES

Cases: PAGE

Chapman v. California, 386 U. S. 18 (1967)..... 9
Harrington v. California, 395 U. S. 250 (1969).... 9
Herndon v. Georgia, 295 U. S. 441 (1935)..... 7
Republic Steel Corporation v. Maddox, 379 U. S. 650 (1965) 9
Taylor v. Kentucky, ____ U. S. ____, 98 S. Ct. 1930, ____ L. Ed. 2d ____ (rendered May 30, 1978) 4, 5-7, 8, 9, 10, 11

Constitutional Provisions:

Fourteenth Amendment, United States Constitution 2

Miscellaneous:

28 USC §1257(3)..... 2

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No._____

COMMONWEALTH OF KENTUCKY - - *Petitioner*

v.

HAROLD WHORTON - - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The petitioner, the Commonwealth of Kentucky, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Kentucky reversing the conviction of the respondent in the Jefferson Circuit Court at Louisville, Jefferson County, Kentucky.

OPINION BELOW

The Trial Court rendered no written opinion in this case. The Opinion of the Kentucky Supreme Court was rendered on July 25, 1978 and has not yet been reported. It is printed in the Appendix to this petition beginning at page 13. The Mandate of the Kentucky Supreme Court denying the Petitioner's motion for rehearing and modification appears in the Appendix at page 39.

JURISDICTION

The Judgment of the Kentucky Supreme Court was entered on July 25, 1978. A timely petition for rehearing and modification was denied by that Court on October 10, 1978. The jurisdiction of this Court is invoked pursuant to 28 USC § 1257(3).

QUESTION PRESENTED

Whether the Kentucky Supreme Court Misinterpreted and Misapplied to This Case the Prior Decision of This Court in *Taylor* v. *Kentucky*, 436 U. S. ____, 98 S. Ct. 1930, ____ L. Ed. 2d ____ (1978)?

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE AND THE FACTS

The respondent, Harold Whorton, was convicted in the Jefferson Circuit Court, Criminal Division, Jefferson County, Kentucky, on ten counts of first degree robbery, two counts of first degree wanton endanger-

ment[1] and two counts of first degree attempted robbery. Judgment was entered on the jury's verdict sentencing Whorton to consecutive terms aggregating 230 years of imprisonment.

The charges against Whorton grew out of three separate incidents. During the early morning hours of May 15, 1976, a black male entered a Krispy Kreme Donut Shop in or near Shively in Jefferson County, Kentucky carrying a pistol in one hand and a knife in the other. He proceeded to rob the store and three of its employes. Those three employes subsequently identified Harold Whorton as the robber.

On the evning of the same day a black male carrying a gun in one hand and a knife in the other entered and robbed a Burger Chef restaurant located on Shelbyville Road in Jefferson County, Kentucky. Two of the employes of that restaurant, who were present during the robbery, subsequently identified Harold Whorton as the robber.

One June 1, 1976, near midnight a man entered a Jerry's restaurant on Brownsboro Road in Jefferson County, Kentucky and after ordering some food stuck a gun in the face of a waitress and announced that "this is a robbery." He then asked for the manager who was in the back of the restaurant. When the manager came to the front of the restaurant the robber herded the employes and several patrons together,

---

[1]The wanton endangerment convictions were reversed pursuant to a separate state ground on appeal. However, the sole basis for the reversal of Respondent's other state convictions in this case was the failure of the trial court to instruct the jury, upon request, as to the presumption of innocence.

taking money from the customers' wallets, and forcing the manager to give him the money from the safe. The robber then left this assembled group in a back room of the restaurant and made his escape. However, one of the customers had managed to sneak away unnoticed and called the police from another restaurant located across the street. Shortly thereafter, a police officer gave chase to an automobile departing the vicinity and ran it down when it struck a fire hydrant. Harold Whorton emerged from that automobile and pointed a pistol at the officer, but dropped it when commanded to do so. Whorton and a companion were taken at once to Jerry's restaurant where ten of the persons present during the robbery identified Whorton as the robber.

Whorton did not testify at his trial. The only evidence in his defense was given by his wife and her sister, who offered alibi testimony with regard to his whereabouts during the night on which the donut shot robbery occurred.

REASONS FOR GRANTING THE WRIT

The Supreme Court of Kentucky has misinterpreted and incorrectly applied a prior decision of this Court, *Taylor* v. *Kentucky,* 436 U. S. ——, 98 S. Ct. 1930, —— L. Ed. 2d —— (rendered May 30, 2978), in the instant case. That court has interpreted "*Taylor* to mean that when an instruction on the presumption of innocence is asked for and denied there is reversible error." This interpretation requires *automatic reversal* in every such case regardless of the circumstances of the trial or the possible application of harmless error principles. We believe such an interpretation of *Taylor* v. *Kentucky* is wrong.

In *Taylor* v. *Kentucky,* 436 U. S. ——, 98 S. Ct. 1930, —— L. Ed. 2d —— (rendered May 30, 1978), this Court held that *under the facts* of that case a Kentucky conviction had to be reversed when a request for a presumption of innocence instruction had been refused by the trial court. On June 7, 1978, a week after the *Taylor* decision had been rendered by this Court, the instant case came before the Supreme Court of Kentucky for oral argument.[2] One of the issues in this case was whether the trial court erred in refusing to grant a requested instruction on presumption of innocence. The Supreme Court of Kentucky subsequently rendered its Opinion on July 25, 1978, in the instant case[3] and, with respect to the presumption of innocence instruction issue, stated as follows:

> "In *Taylor* a judgment of the Franklin Circuit Court was reversed because the trial court declined to instruct the jury that the law presumes

---

[2]After the decision in *Taylor* v. *Kentucky* by this Court, but before the issuance of the opinion in the instant case by the Kentucky Supreme Court on July 25, 1978, the Kentucky Court of Appeals—an intermediate state appellate court—*affirmed* convictions in two cases involving requested instructions on presumption of innocence. *Gully* v. *Commonwealth,* File No. CA-2048-MR, and *Stewart* v. *Commonwealth,* File No. CA-1963-MR. These cases were not to be published, and are not cited here as authority, but to apprise this Court chronologically of the impact of *Taylor* v. *Kentucky* in the Commonwealth of Kentucky.

[3]The Supreme Court of Kentucky also reversed on the same day as the *Whorton* decision the cases of *Williams* v. *Commonwealth,* File No. 78-SC-68-MR and *Avery* v. *Commonwealth,* File No. 78-SC-75-MR by Memorandum Opinions. Petitioner intends to file Petitions for Writ of Certiorari in both cases.

a defendant innocent—and this despite the fact that on *voir dire* the jurors had already signified that they understood that proposition! If the trial court's 'truncated discussion of reasonable doubt . . . was hardly a model of clarity,' as remarked in *Taylor,* we must confess that we have a similar difficulty with the *Taylor* opinion itself.

The dissenting members of our court feel that the holding in *Taylor* is confined to the facts of the case. They draw that inference from the next-to-last sentence of the opinion (emphasis added): 'We hold that *on the facts of this case** the trial court's refusal to give petitioner's requested instruction in the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment.'

Admittedly, the weight of the evidence against Whorton was far greater than it was against the defendant in *Taylor.* But does the Supreme Court actually mean to suggest that a defendant's right to the instruction can be made, ultimately, to stand or fall on the weight of the evidence in a given case? If so, then every case in which the trial court refused to give it will have to be decided according to the Chapman-Harrington harmless-error test. If that was the intention, it would have been considerate of the court to say so. It may be that the question of harmless error was not argued in that case, but 'a model of clarity' would have left a clean cut rather than a jagged stump. After all, it might reasonably have been foreseen that this court would have to apply the

*Footnote 4 from the *Whorton* Opinion reads as follows: "4 On what other facts an appellate court might rest its decision we hesitate to guess."

decision to a goodly number of other cases then in the process of appeal in this state, Whorton's being but one of them.

Those of us in the majority would like to be able to hold that this newly-declared constitutional requirement is subject to the harmless-error rule, but we are afraid it might not stick. We know very well that in actuality *Taylor* was no more 'prejudiced' in his case than Whorton was in this one. Yet *Taylor* contains no hint that it might have been appropriate to consider whether the error was in fact prejudicial. To bring this discussion to a merciful end, we read *Talyor* to mean that when an instruction on the presumption of innocence is asked for and denied there is a reversible error. If it means something short of that, we shall welcome further enlightenment from the only source that seems to be able either to construe or to amend the Constitution.

The judgment is reversed with directions for a new trial."

The aforementioned language in the opinion constituted an unexpected and surprise interpretation of *Taylor* v. *Kentucky* by the Supreme Court of Kentucky and petitioner thereafter filed a Petition for Rehearing and Modification which was subsequently denied on October 10, 1978. See Appendix, page 38. This Petition for Writ of Certiorari now results. Compare *Herndon* v. *Georgia,* 295 U. S. 441 (1935).

It is the position of the petitioner that the Supreme Court of Kentucky has misinterpreted the substance of *Taylor* v. *Kentucky* and has misapplied that case to the one at bar. This misinterpretation of *Taylor* v.

Kentucky poses a serious hindrance to the effective administration of criminal justice in Kentucky and will require the automatic reversal of numerous state criminal convictions.

In the instant case numerous eyewitnesses to the various offenses identified the respondent as the person who had committed those offenses. The evidence in the instant case is nothing short of overwhelming and is certainly much in contrast to the evidence that had been presented in the *Taylor* case. Moreover, unlike *Taylor* there is no suggestion in the case at bar that the prosecutor acted in an improper fashion during closing argument or at any other time. In *Taylor* the prosecutor's comments were thought to give rise to inferences of the accused's guilt. Such is not true in the case at bar. Nor, were there any harmful inferences made with respect to references in the indictment as in *Taylor*. And, there are no suggestions in this case of Whorton's status as a defendant tending in itself to establish his guilt like those that occurred in the *Taylor* case. Finally, the evidence at trial in this case, unlike *Taylor,* cannot be described as a mere swearing contest between victim and accused.

Perusal of the decision of this Court in *Taylor* v. *Kentucky* seems to indicate that that decision was based solely upon its rather unique and unusual facts. The numerous extraneous circumstances which occurred during the trial in the *Taylor* case were specifically noted by this Court and, when they were considered together, appeared to establish the basis for the violation of Taylor's constitutional rights. The

petitioner maintains that absent any similar such factual circumstances during trial, as in *Taylor,* no such constitutional violation would necessarily occur.

However, the Supreme Court of Kentucky has interpreted *Taylor* v. *Kentucky* to mean "that when an instruction on the presumption of innocence is asked for and denied there is a reversible error." Under the decision of the Supreme Court of Kentucky in the instant case the respondent's conviction in this case and in every case pending in Kentucky must be *automatically* reversed without regard to the circumstances of the case, the nature of the evidence adduced at trial, or the manner in which the case was prosecuted and defended by counsel or presided over by the trial court. The petitioner submits that this construction of *Taylor* v. *Kentucky* as set out by the Supreme Court of Kentucky in the *Whorton* case is incorrect and that this Court should grant a writ of certiorari to review this matter and to correct the misinterpretation. Compare *Republic Steel Corp.* v. *Maddox,* 379 U. S. 650, 652 (1965). Specifically, the judgment of the lower court should be reversed and vacated with respect to the *Taylor* issue and it should at least be reconsidered in light of applicable harmless error cases of this Court such as *Harrington* v. *California,* 395 U. S. 250 (1969), and *Chapman* v. *California,* 386 U. S. 18 (1967).[4]

---

[4]In its Petition For Rehearing and Modification before the Supreme Court of Kentucky, the Petitioner estimated that between 20 and 80 criminal cases would be automatically reversed due to that court's interpretation of *Taylor* v. *Kentucky* in *Whorton* v. *Commonwealth.* Such automatic reversal under *Whorton* would also apparently apply to *Miller* v. *Kentucky,* No. 77-6912, wherein

(Footnote continued on following page)

It is the position of the petitioner that *Taylor* v. *Kentucky* does not mean that a state criminal conviction in Kentucky must be reversed automatically when a requested instruction on presumption of innocence is refused by the trial court. It is our belief that *Taylor* v. *Kentucky* does not create a rule of law requiring such an instruction as a *sine qua non* in Kentucky criminal cases.[5] In fact, it appears to the petitioner that under *Taylor* v. *Kentucky* any alleged federal constitutional impact of such an instruction, whether requested or not, would depend wholly on the circumstances of each criminal case and it would be only in those cases having exceptional circumstances, such as in *Taylor* v. *Kentucky,* where the absence of such instruction whether requested or not would result in a

(Footnote continued from preceding page)
this Court recently granted an accused's Petition for Writ of Certiorari on October 2, 1978 and reversed and vacated the judgment of the Supreme Court of Kentucky, ordering that case to be reconsidered in light of *Taylor* v. *Kentucky.* The Miller conviction had been affirmed by the state appellate court before this Court rendered its decision in *Taylor.*

[5]The Supreme Court of Kentucky amended Kentucky Rule of Criminal Procedure 9.56, effective July 1, 1978, requiring a presumption of innocence instruction in every criminal case. That Rule reads as follows:

"(1) In every case the jury shall be instructed substantially as follows: 'The law presumes a defendant to be innocent of a crime, and the indictment [or other accusatory document] shall not be considered as evidence or as having any weight against him. You shall find the defendant not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty [and if you find him guilty but have a reasonable doubt as to the degree of the offense of which he is guilty, you shall find him guilty of the lower degree.]'

"(2) The instructions should not attempt to define the term 'reasonable doubt'."

violation of an accused's right to due process under the Fourteenth Amendment to the United States Constitution. The Supreme Court of Kentucky in its Opinion in *Whorton* v. *Commonwealth* has clearly misinterpreted the decision of this Court in *Taylor* v. *Kentucky.*

CONCLUSION

For the foregoing reasons the petitioner respectfully submits that this Court should grant a writ of certiorari in this case in order to rectify the misinterpretation and application by the Supreme Court of Kentucky of *Taylor* v. *Kentucky* in the case at bar.

Respectfully submitted,

ROBERT F. STEPHENS
Attorney General

PATRICK B. KIMBERLIN, III
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

Counsel for Petitioner

PROOF OF SERVICE

I, Patrick B. Kimberlin, III, one of counsel for the petitioner, hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari were mailed, postage prepaid, this 11th day of October, 1978, to Hon. Terrence R. Fitzgerald, Chief Appellate Defender, Jefferson District Public Defender, 200 Civic Plaza, 701 West Jefferson, Louisville, Kentucky 40202, Counsel for Respondent.

Patrick B. Kimberlin III

PATRICK J. KIMBERLIN, III
Assistant Attorney General

APPENDIX

SUPREME COURT OF KENTUCKY

RENDERED: JULY 25, 1978

78-SC-92-MR

HAROLD WHORTON - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Jefferson Circuit Court
Hon. S. Rush Nicholson, Judge
Indictment Nos. 157667, 157406 & 157391

OPINION OF THE COURT BY CHIEF JUSTICE PALMORE—REVERSING—Docketed July 25, 1978

Harold Whorton appeals from a judgment sentencing him to consecutive terms aggregating 230 years of imprisonment pursuant to a verdict finding him guilty on 10 counts of 1st-degree robbery, two counts of 1st-degree wanton endangerment, and two counts of 1st-degree attempted robbery.

The various charges grew out of three separate incidents. At a pre-daylight hour on May 15, 1976, a black male entered the Krispy Kreme Doughnut Shop in or near Shively carrying a pistol in one hand and a knife in the other. He proceeded to rob the store and three of its employes. The three employes later identified Whorton as the robber. Late in the evening of the same day a black male carrying a gun in one hand and a knife in the other entered and robbed the Burger Chef Restaurant on Shelbyville

Road. Two of the restaurant employes then present in the restaurant later identified Whorton as the robber. On June 1, 1976, around midnight, a man came into Jerry's Restaurant on Brownsboro Road and, after ordering two cheeseburgers, stuck a gun in the face of the waitress, announced that "this is a robbery," and asked for the manager, who was in the back of the restaurant. When the manager came up front the robber herded all of the patrons and employes together, took the money from the customers' wallets, forced the manager to give him the money from a safe, and left the assembled company together in a back room before leaving. Meanwhile, however, one of the customers managed to sneak away unnoticed and called the police from another restaurant across the street. Shortly thereafter a police officer gave chase to an automobile departing the vicinity and ran it down when it struck a fire hydrant. Whorton emerged from the automobile and pointed a pistol at the officer, but dropped it when commanded to do so. Whorton and a companion were taken at once to Jerry's Restaurant, where 10 of the persons present during the robbery identified whorton as the robber.

During the episode at Jerry's Restaurant, while he was directing the employes and patrons into the rear area of the premises, Whorton said, "If you don't think I'll shoot you, I'll prove it," and fired a shot into the ceiling. This particular act on his part was the basis for one of the wanton endangerment charges (the other endangerment count was for pointing a gun at the arresting officer), pursuant to which he was sentenced to five years in the penitentiary.

Whorton did not testify. The only evidence in his defense was given by his wife and her sister, who offered alibi testimony with regard to his whereabouts during the night on which the doughnut shop robbery occurred.

Prior to the trial Whorton moved, among other things, that the issues of guilt or innocence be submitted to the jury separately from the fixing of the penalty or penalties, in order that he might appear as a witness only at the second stage for the purpose of showing mitigating circumstances, including his valorous military service during the Korean Conflict. Although neither our statutes nor rules of court authorize such a bifurcation except in persistent-offender and capital cases (cf. KRS 532.080, KRS 532.025), he contends that the trial court's refusal to grant it deprived him of a fair trial.

At the close of the evidence and before the jury was instructed, counsel for Whorton tendered several federal-court type instructions which the trial court declined to give. One of these, undertaking to define reasonable doubt, was as follows:

"A reasonable doubt is a fair doubt based upon reason and common sense and arising from the state of the evidence. It is rarely possible to prove anything to an absolute certainty. The meaning of the rule is that the proof must be such as to exclude, not every hypothesis or possibility of innocence, but any fair and rational hypothesis except that of guilt; what is required is not an absolute or mathematical certainty but a moral certainty. An accused is not to be convicted on mere suspicion or conjecture. A reasonable doubt may arise, not only from the evidence produced, but also from a lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, an accused has the right to rely upon failure of the prosecution to establish such proof. (An accused may also rely upon evidence brought out on cross-examination of witnesses for the prosecution.) The law does not impose upon an accused the duty of producing any evidence. A reasonable doubt exists in any case when, after careful and impartial consideration of all the evidence, the jury mem-

bers do not feel convinced to a moral certainty that an accused is guilty of the offense(s) charged."

Another, instructing on the presumption of innocence, and substantially similar to the one offered and refused in Taylor v. Kentucky, U. S. (1978), was as follows:

"The law presumes an accused to be innocent of crime. He begins the trial with a clean slate, with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit an accused unless the jury members are satisfied beyond a reasonable doubt of the accused's guilt from all the evidence in the case."

As given by the trial court, each of the instructions covering the various charges submitted to the jury authorized a finding of guilt only if the jury believed, (a) from the evidence and (b) beyond a reasonable doubt, that the defendant had committed the acts, with the requisite criminal intent, that constituted the respective offense. In addition, and as directed by RCr 9.56,[1] the jury was specially instructed that if upon the whole case it had a reasonable doubt as to the defendant's guilt it was required to find him not guilty and, as to those charges on which the instructions embraced more than one degree of the offense, that if it found the defendant guilty but had a reasonable doubt as to the degree it was required to find him guilty of the lower degree. The special instruction on reasonable doubt defined the term as "a substantial doubt, a real doubt, in that you must ask yourself not whether a better case might have been proven but whether, after hearing all the evidence, you actually doubt that the defendant is guilty." This definition originated, of course, from a passage contained in Merritt v. Commonwealth, Ky., 386 S. W.

[1]In view of Taylor v. Kentucky, ____ U. S. ____ (1978), RCr 9.56 was amended as of July 1, 1978, to require inclusion of the presumption of innocence.

2d 727, 729 (1965). It was specifically approved for inclusion as a part of the instructions for criminal cases in Whitaker v. Commonwealth, Ky., 418 S. W. 2d 750, 752 (1967), and subsequently has been upheld in numerous cases.[2]

With regard to the request for a bifurcated trial, the argument is that the 5th-Amendment right of silence is diluted, or "chilled," by the fact that if a defendant elects to avail himself of its protection he pays a penalty in not being able to give mitigating testimony pertinent only to the amount of punishment in event of his conviction. We discussed a closely-related problem in Brown v. Commonwealth, Ky., 551 S. W. 2d 557, 559-560 (1977), in which a defendant tried in a bifurcated persistent-offender proceeding asserted the converse proposition that his right to testify in his own behalf during the first stage of the trial would be unconstitutionally diminished by use in the second stage of information elicited from him through cross-examination at the first stage. And our answer here is much the same as it was there. In this state both functions, the finding of guilt and the fixing of punishment, always have been performed by the jury. There is no constitutional requirement that it be otherwise, or that the two be performed by different juries. So, when they are performed by the same jury the defendant simply must weigh the good he can do against the harm he may bring upon himself by electing to testify. As observed in *Brown*, the state's right of cross-examination is a chilling specter for the defendant to contemplate in any criminal case. We doubt, however, that even the Supreme Court of the United States is ready to declare that it violates the 5th Amendment. Needless to say, this court is not.

[2]Also in view of Taylor v. Kentucky, *supra*, n.1, RCr 9.56 has been amended to caution against any attempt to define "reasonable doubt."

The right of cross-examination to which a defendant submits himself by testifying in his own behalf exists for the protection of the people at large. It is an indispensable countervailing factor in the adversary system. What the appellant asks us to do here is to trim it down, by confining it to the particular subject on which he chooses to testify. Logically, it would be the same for an accused rapist to insist that he be permitted to testify that he did not steal the victim's purse without submitting himself to questioning as to whether he raped her. The 5th Amendment gives him no such protection. He may not, by selecting the subject upon which he chooses to testify, use his constitutional right of silence to shield him against cross-examination on other subjects that are relevant to the case as a whole.

We agree that under the rationale of Sherley v. Commonwealth, Ky., 558 S. W. 2d 615 (1977), Whorton's use of a pistol in firing a shot into the ceiling of Jerry's Restaurant did not constitute an offense separate from the 1st-degree robbery charge for which he was being tried and was convicted. Two of the three elements listed by KRS 515.020 (1) as elevating robbery to the righest degree are (1) being armed with a deadly weapon or (2) using or threatening to use a dangerous instrument. Though not every "dangerous instrument" is a "deadly weapon," a "deadly weapon" ordinarily is a "dangerous instrument" as well. Hence both of these elements were proved in this case. That is, Whorton could have been found guilty of 1st-degree robbery either on the basis of his having been armed with a deadly weapon or on the basis of his having used or threatened to use that weapon. Neither, however, can be split off from the other and be treated as a separate offense. It was error to submit to the jury the charge of wanton endangerment growing out of the firing of a shot into the ceiling.

We shall not undertake to discuss at length the definition of reasonable doubt offered by Whorton as against the one given by the trial court. The point was noticed by a

faint lifting of the skirt in Taylor v. Kentucky, U. S. (1978), wherein it was observed that the definition given by the trial court "though perhaps not in itself reversible error, often has been criticized as confusing." It probably is beyond cavil that in the field of law many things are confusing to some, and that some things, among them a good sample of opinions by the United States Supreme Court itself, are confusing to all. We are at a loss to comprehend how a doubt may be considered "reasonable" if it is without substance, and therefore is insubstantial. The definition of "reasonable doubt" that has been approved by this court in recent years was borne of courtroom experience and discussion with jurors who had freshly emerged from the task of wrestling with an intangible concept, and who quite often were disposed to equate the term with "any shadow of a doubt," or with a querulous sense of disappointment that somehow the prosecution had not proved its case to the degree that the jurors could arrive at a verdict without perspiring. Be that as it may, we now throw in the towel. As noted in Merritt v. Commonwealth, Ky., 386 S. W. 2d 727, 729 (1965), we were never so presumptuous anyway as to believe that where others had failed we might succeed. The long and short of it is that we can no longer approve this definition, but unless and until the highest judicial authority is willing to hold it constitutionally fatal, neither will this court do so. Under the circumstances, we are of the opinion that the jury in this case was sufficiently and properly instructed on the subject.

From time immemorial the emphasis with regard to jury instructions in this state has been placed on simplicity. "The function of instructions in this jurisdiction is only to state what the jury must believe from the evidence (and in a criminal case, beyond a reasonable doubt) in order to return a verdict in favor of the party who bears the burden of proof." Webster v. Commonwealth, Ky., 508 S. W. 2d 33, 36 (1974). Thus we have sought to avoid abstract legal

principles, presumptions,[3] comments on the weight of the evidence, and references to the burden of proof, which is cast by the form of instruction requiring that in order to make an affirmative finding the jury must, on the basis of the evidence, believe certain specified facts to be true. This approach minimizes the possibility of intrusion by the judge into that particular area of decision-making which belongs exclusively to the jury, and it minimizes the possibility of error in that respect. Many lawyers and some judges, including the writer of this opinion, abhor the system that prevails in the federal trial courts, where at the close of the evidence the judge assumes the pulpit and turns preacher, droning out sweaty reams of boilerplate that few jurors really could be expected to digest.

Any thought that our form of instructions might have been designed for the simple-minded would be absurd. Its philosophy is to keep the jury strictly in its place, to keep the judge strictly in his place, to facilitate uniformity, to minimize error, and to avoid prolixity.

To abdicate this wholesome philosophy and flee to the soporific style of the federal courts for the mere sake of taking a step toward nationwide homogeneity would be regrettable. If there is to be a uniform system for the country, better might we entertain the hope that some consideration be given to the proposition that ours may be the preferable choice. Although the Supreme Court's reference to the instructions in *Taylor* as "skeletal" and "Spartan" may not have been so intended, it was more of a compliment than a slur. Indeed, we ourselves have said that instructions ought to provide "only the bare bones." Cox v. Cooper, Ky., 510 S. W. 2d 530, 535 (1974). To suggest that they are undernourished simply because they so appear in comparison with the bloated and cumbersome instructions

[3]See Mason v. Commonwealth, Ky., ____ S. W. 2d ____ (April 11, 1978), in which future reference to the presumption of sanity was proscribed.

customarily given in the federal courts is nothing less than a symptom of myopia.

In *Taylor* a judgment of the Franklin Circuit Court was reversed because the trial court declined to instruct the jury that the law presumes a defendant innocent—and this despite the fact that on *voir dire* the jurors had already signified that they understood that proposition! If the trial court's "truncated discussion of reasonable doubt . . . was hardly a model of clarity," as remarked in *Taylor*, we must confess that we have a similar difficulty with the *Taylor* opinion itself.

The dissenting members of our court feel that the holding in *Taylor* is confined to the facts of the case. They draw that inference from the next-to-last sentence of the opinion (emphasis added): "We hold that *on the facts of this case*[4] the trial court's refusal to give petitioner's requested instruction in the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment."

Admittedly, the weight of evidence against Whorton was far greater than it was against the defendant in *Taylor*. But does the Supreme Court actually mean to suggest that a defendant's right to the instruction can be made, ultimately, to stand or fall on the weight of the evidence in a given case? If so, then every case in which the trial court refused to give it will have to be decided according to the Chapman-Harrington harmless-error test. If that was the intention, it would have been considerate of the court to say so. It may be that the question of harmless error was not argued in that case, but "a model of clarity" would have left a clean cut rather than a jagged stump. After all, it might reasonably have been foreseen that this court would have to apply the decision to a goodly number of

[4]On what other facts an appellate court might rest its decision we hesitate to guess.

other cases then in the process of appeal in this state, Whorton's being but one of them.

Those of us in the majority would like to be able to hold that this newly-declared constitutional requirement is subject to the harmless-error rule, but we are afraid it might not stick. We know very well that in actuality Taylor was no more "prejudiced" in his case than Whorton was in this one. Yet *Taylor* contains no hint that it might have been appropriate to consider whether the error was in fact prejudicial. To bring this discussion to a merciful end, we read *Taylor* to mean that when an instruction on the presumption of innocence is asked for and denied there is a reversible error. If it means something short of that, we shall welcome further enlightenment from the only source that seems to be able either to construe or to amend the Constitution.

The judgment is reversed with directions for a new trial.

All concur except for Clayton and Stephenson, JJ., who dissent.

Attorneys for Appellant:
TERRENCE R. FITZGERALD
Deputy Public Defender
DANIEL T. GOYETTE
Associate Director
Office of the Jefferson District Public Defender
1000 Republic Building
Louisville, Kentucky 40202

Attorneys for Appellee:
ROBERT F. STEPHENS
Attorney General
VICTOR FOX
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

RENDERED: JULY 25, 1978

SUPREME COURT OF KENTUCKY

78-SC-92-MR

HAROLD WHORTON - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal From Jefferson Circuit Court
Honorable S. Rush Nicholson, Judge
Nos. 157,667—157,406—157,391

CONCURRING OPINION BY JUSTICE LUKOWSKY

I concur with my brothers in the result we reach in this case. However, it seems to me that this case provides a forum in which we should articulate the paradoxical philosophies with which we are besieged and propose a course of action to minimize the problems which they create.

In the field of criminal procedure we have observed a decisional process by the Supreme Court of the United States which has crushed the status of the several states as "insulated chambers" of legal experimentation.[1] The fuel which has fed this juggernaut is the concept that the due process clause of the Fourteenth Amendment of the Constitution of the United States makes the First, Fourth,

---

[1]Truax v. Corrigan, 257 U. S. 312, 343 (Holmes J., dissenting) (1921).

Fifth, Sixth and Eighth Amendments of that document binding upon the several states.

The purpose of this discussion is not to ascertain whether this fuel is historically distilled[2] or artifically synthesized.[3] Rather it is to examine the path made by the steamroller and determine how it may be traveled most smoothly.

Most of the path in Kentucky was free of obstacles because the federal constitutional rules imposed by these decisions were in force here as matters of state law long prior to their enunciation by the Supreme Court of the United States.[4] However, as the Supreme Court continues its journey it digs deeper in the terrain of state procedure, destroys traditional state perogatives[5] and causes adjust-

---

[2]The historical validity of this rationale is supported by Hutchinson, The Foundations of the Constitution (1975) and Gora, Due Process of Law (1977).

[3]The historical validity of this rationale is undermined by Meyer, The History and Meaning of the Fourteenth Amendment, Judicial Erosion of the Constitution Through the Misuse of the Fourteenth Amendment (1977) and Berger, Government by Judiciary, the Transformation of the Fourteenth Amendment (1977).

[4]*Compare:* Mapp v. Ohio, 367 U. S. 643 (1961) *with* Youman v. Commonwealth, 189 Ky. 152, 224 S. W. 860 (1920) (suppression of evidence illegally obtained); Gideon v. Wainwright, 372 U. S. 335 (1963) *with* Turner v. Commonwealth, 89 Ky. (7 Bush) 78, 81, 1 S. W. 475, 476 (1886) and Holland v. Commonwealth, 241 Ky. 813, 45 S. W. 2d 476, 477 (1932) (indigent's right to appointed counsel in serious criminal cases); Duncan v. Louisiana, 391 U. S. 145 (1968) *with* Constitution of Kentucky Sec. 11 (1891) (right to trial by jury); Ballew v. Georgia, ____ U. S. ____, 46 U.S.L.W. 4217 (1978) *with* Constitution of Kentucky Sec. 248 (1891) (permissible size of juries); Jackson v. Denno, 378 U. S. 368 (1964) with KRS 422.110(2) (1942) (method of determination of admissibility of confessions); Coker v. Georgia, 433 U. S. 584 (1977) *with* KRS 510.040(2) and 532.030 (1975) (imposition of the death penalty for rape).

[5]*See, e.g.,* In re Gault, 387 U. S. 1 (1967) (constitutionalization of juvenile procedures); Furman v. Georgia, 408 U. S. 238 (1972); Roberts v. Louisiana, 428 U. S. 325 (1976); Gregg v. Georgia, 428 U. S. 153 (1976) (procedure for invoking death

(Footnote continued on following page)

ments to be made which are of uncalculated impact. The court has also chosen to examine but has refrained so far from disturbing other state procedural devices.[6] It is fair to say that this process has nationalized criminal procedure,[7] even thought there are those who would dispute this conclusion.[8] The course of the Burger court is not significantly different from that of the Warren court, except that it has limited the use of federal habeas corpus as a method of enforcing these newly promulgated constitutional rights.[9]

State systems of criminal procedure are like delicate Swiss watches. They are designed to equally balance the rights of the parties. When the balance is externally disturbed the shockwave requires a reevaluation and readjustment of the entire system.

(Footnote continued from preceding page)

penalty); Coleman v. Alabama, 399 U. S. 1 (1970) (right to counsel at preliminary hearing); Henderson v. Morgan, 426 U. S. 637 (1976) (guilty plea procedure); Chambers v. Mississippi, 410 U. S. 284 (1973) (evidentiary rules); Tate v. Short, 401 U. S. 395 (1971) (indigents not subject to imprisonment for non-payment of a fine); Herring v. New York, 422 U. S. 853 (1975) (closing argument at trial required); Wardius v. Oregon, 412 U. S. 470 (1973) (notice of alibi rule requires reciprocal discovery).

[6]*See, e.g.,* Chaffin v. Synchcombe, 412 U. S. 17 (1973) (jury sentencing permissible); McGautha v. California, 402 U. S. 183 (1971) (bifurcated trial not required); Lego v. Twomey, 404 U. S. 477 (1972) (voluntariness of a confession may be determined by the trial judge on a preponderance of the evidence standard and need not be redetermined by the jury); Johnson v. Louisiana, 406 U. S. 356 (1972); Apodaca v. Oregon, 406 U. S. 404 (1972) (unanimous verdict not required); McKeiver v. Pennsylvania, 403 U. S. 528 (1971) (juveniles have no right to a jury in a delinquency trial).

[7]*E.g.,* Pye, The Warren Court and Criminal Procedure, 67 Mich. L. Rev. 249 (1968); Meador, Are We Heading for a Merger of Federal and State Courts?, 17 The Judges' Journal, No. 2, 9 (1978).

[8]*E.g.,* Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L. Rev. 929 (1965); Burger, To Weaken Our State Courts Is to Destroy Federalism, 17 The Judges' Journal, No. 2, 10 (1978).

[9]Wainwright v. Sykes, 433 U. S. 72 (1977); Stone v. Powell, 428 U. S. 465 (1976).

Taylor v. Kentucky, ____ U. S. ____, 46 U.S.L.W. 4528 (1978), provides a perfect example. The case in effect establishes the principle that the due process clause of the Fourteenth Amendment requires a state trial judge to instruct the jury on the presumption of innocence when requested by a criminal defendant. The system of instructing juries developed in Kentucky prohibits instructions on presumptions and permissible inferences. The theory is that to avoid undue influence by the trial judge on the fact finding process for or against either party the instructions should simply focus the attention of the jury on those ultimate facts which it must decide in order to reach a verdict. Consequently, the instructions are skeletal in form, given prior to closing argument and leave to the lawyers the task of fleshing them out in closing argument insofar as the evidentiary facts of the case, the weight of the evidence and the credibility of the witnesses are concerned.

This rule was a two-edged sword and cut equally for and against both sides of the case. For example, we recently held that the Commonwealth was not entitled to an instruction on either the presumption of sanity or the presumption of knowledge which arises from the possession of recently stolen goods. Mason v. Commonwealth, Ky., ____ S. W. 2d ____ (1978); Wells v. Commonwealth, Ky., 561 S. W. 2d 85 (1978). Obviously, Taylor, *supra,* requires the restoration of balance to the rights of the parties. No thought was given to this aspect of the problem by those who mandated the change because they were neither conversant with the operation of the system, nor responsible for its maintenance.

A trial is no more than a search for the truth. The method by which that search is conducted is of little import so long as it is rational, fair to all parties and civilized. The concept of a national mode of criminal procedure is not too unpalatable to be swallowed in America a century after the Civil War. The Supreme Court of the United States has

made it clear that it will no longer pay homage to "federalism" by permitting the states to experiment with an ever lengthening list of new found "fundamental" rights of defendants in criminal cases.[10]

We should abandon the absolute fortresses of local criminal procedure. Their unique character may be matters of pride, but their use does not so improve the search for the truth as to justify the time and energy lost in their defense. The litigation they spawn diffuses our efforts to apply, develop, and interpret substantive law and subordinates the question of guilt or innocence to the justification for the retention of local practices.

I would end the conflict and equalize the position of the parties now by:

1. Amending our Rules of Criminal Procedure to conform as closely as possibly with the Federal Rules of Criminal Procedure including:

(a) Permitting the trial judge to charge the jury orally after closing argument and to comment on the weight of the evidence and the credibility of the witnesses.[11] *Contra,* RCr 9.54(1).

---

[10] *Compare* Crist v. Bretz, ____ U. S. ____, 46 U.S.L.W. 4639 (1978) *with* Graham v. Commonwealth, Ky., 562 S. W. 2625 (1978) *and* Cross v. Commonwealth, 270 Ky. 537, 109 S. W. 2d 1214 (1937) (when jeopardy attaches).

[11] This change has been advocated in civil as well as criminal cases on state constitutional grounds. Lukowsky, The Constitutional Right of Litigants to Have the State Trial Judge Comment Upon the Evidence, 55 Ky. L. J. 121 (1966). There are those who maintain that this should not be permitted because state trial judges are not as able as their federal counterparts. It must be remembered that federal judges are "appointed" not "annointed." There is no valid reason why the political accident that a man is a federal rather than a state judge should make him more competent, or conscientious, or learned that his opposite number in the state courthouse. Stone v. Powell, *supra* n. 6, at 493 n. 35. Three of the six United States district judges presently sitting in Kentucky were appointed to their posts while they were sitting as judges of the Circuit Court of Kentucky. This method of instructing juries is in satisfactory use in fourteen states. Lukowsky, *supra,* at 125 n. 12.

(b) Abandoning the rule that a conviction may not be based on the uncorroborated testimony of an accomplice. *Contra,* RCr 9.62.

(c) Requiring the trial judge to fix all penalties other than death upon conviction. *Contra,* RCr 9.84.

(2) Adopting the Federal Rules of Evidence in toto, at least for use in criminal cases.[12]

This approach would insure that if the Supreme Court of the United States should reverse a Kentucky case on procedural grounds it would have to dine on a procedure, which it prepared and we could take comfort in the lament of the homemaker that the dullest food is that which you cook yourself.

[12]*Compare* Chambers v. Mississippi, *supra* n. 5 *with* Crawley v. Commonwealth, Ky., ____ S. W. 2d ____ (1978).

RENDERED: JULY 25, 1978

SUPREME COURT OF KENTUCKY

78-SC-92-MR

HAROLD WHORTON - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal From Jefferson Circuit Court
Honorable S. Rush Nicholson, Judge
Nos. 157,667—157,406—157,391

CONCURRING OPINION BY JUSTICE REED

I join the majority opinion to the extent it holds that the only reversible errors presented were the trial judge's refusal to comply with the submitted request of the appellant for an instruction on the "presumption" (more properly, assumption) of innocence, and his submission to the jury of the charge of wanton endangerment growing out of the firing of a shot into the ceiling despite appellant's objection that the submission constituted an impermissible multiplicity. I do not, however, agree with some of the observations made in the majority opinion, although I do thoroughly agree with other statements made therein.

When the trial judge refused to instruct on the "presumption" of innocence, he followed the settled law of this state. That law redounded to the benefit of criminal defendants in many instances where an evidentiary presumption favored the prosecution's case. If the Kentucky system

of jury instructions in criminal cases is now to become one where "presumptions" favorable to defendants must be given but there shall be no instructions on "presumptions" favorable to the prosecution, then the entire procedure is way out of balance and the interests of society to protect the innocent victims of crime and to punish and to prevent the repetition of dangerous and sometimes fatal criminal activity are critically denigrated.

I am in substantial agreement with most of what is said in my brother Lukowsky's concurring opinion. I am persuaded, however, that the United States Supreme Court is not the only agency seeking to impose a gray blanket of national uniformity on the court systems of the several states. So-called national "standards," "guidelines" and "goals" are poured forth without much, if any, consideration given to the experience, record and workability of individual state systems, more particularly those not represented on the frequently formed "conferences," "committees," "commissions," "sections," and "task forces," which with boring frequency are usually composed of the same people who apparently nominate each other for inclusion in the proliferating projects. It taxes one's credibility to conclude that these individuals possess expertise in so many diverse areas.

I do not share the asperity of the majority concerning the federal trial method. After all, it has delivered a good and acceptable product of justice in Great Britain for a long time and fourteen states of the Union are using it with results satisfactory to them. I disagree with my brother Lukowsky that it is either necessary or desirable for a trial judge to comment on the credibility of witnesses or for us to swallow indiscriminately the complete Federal Code of Evidence to assure federal acceptance of our system's results or to provide a fairer system than we have.

My present uneasiness about our jury instruction methods is that they are too complicated rather than too

"sparse" or "truncated." I would prefer letting a trial judge explain in concise layman's language, in all places possible, what a jury's function is and to relate it to the particular case on trial. I would recommend that this procedure be used by the judge at the commencement of trial and after final arguments have been completed. This procedure basically is nothing more than an adaption and extension of the interrogatories to the jury provisions we already have in our procedural rules for civil cases.

SUPREME COURT OF KENTUCKY

78-SC-92-MR

HAROLD WHORTON - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal From Jefferson Circuit Court
Honorable S. Rush Nicholson, Judge
Indictment Nos. 157667, 157406 & 157391

DISSENTING OPINION BY JUSTICE CLAYTON

I believe that the result in *Taylor* v. *Kentucky*, ___ U. S. ___ (1978), was meant to, and that it should, be limited to factual situations similar to the one in that case, and I am greatly surprised and disappointed that the majority of my brothers do not agree.

It should be noted from the outset that although I too resent the *Taylor* decision because it represents yet another encroachment by the United States Supreme Court upon the once hallowed ground of state procedural law, I hardly see how we can take offense at the principle espoused therein. The notion that a man is presumed innocent until proven guilty is every bit as firmly embedded in the criminal law of Kentucky as in its federal counterpart, and in light of the recent revelation that over a third of all Americans believe it is the responsibility of the accused to prove

his or her innocence,* it might be a good idea to remind jurors of this fundamental rule.

Whether an instruction on the presumption of innocence should be given whenever requested, however, is not the question before us. Rather, the question which must be answered is whether the failure to do so automatically constitutes reversible error in every case. Those who join in the majority today answer this query in the affirmative, alleging that they would like to be able to hold the requirement enunciated in *Taylor* subject to the harmless-error doctrine, but asserting that they cannot because "Taylor contains no hint that it might [be] appropriate to consider whether [a failure to instruct on the presumption] is in fact prejudicial." Apparently their hearts were not really in it when they embarked upon the hunt.

Not once, but three times the clue the majority says it is searching for appears in the Taylor opinion, the Supreme Court initially referring to the "cumulative effect of the potentially damaging *circumstances of this case*," and the "particular need for such an instruction *in this case*" and concluding by stating that "[w]e hold that *on the facts of this case* the trial court's refusal to give petitioner's requested instruction on the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment." ___ U. S. at ___ n. 15, ___, and ___ (emphasis added). I submit that it is apparent from these passages that the Supreme Court fully intended to limit *Taylor* to its facts. Although certainly not determinative of the issue, this position is hardly undermined by the comment of the dissenters in Taylor that "[i]n some cases the omission [of an instruction on the presumption of innocence] may be

---

*According to a comprehensive national survey conducted by the National Center for State Courts, the actual figure is 37%. *See* Lawscope: State Courts Seeking to Draw Blueprint for the Future, 64 *A.B.A. Journal* 653 (May 1978).

fatal, but the court wisely avoids holding that this is always so." ____ U. S. at ____ (Stevens, J., dissenting).

Far more important than the appearance of those specific passages, however, is the thrust of the *Taylor* decision as a whole. As I read the majority opinion in that case, there are three significant points to be derived therefrom: first, that instructions on the presumption of innocence and reasonable doubt do not necessarily perform the same function—although both instructions inform the jury *who* has the burden of establishing guilt (the prosecution), the instruction on the presumption of innocence tells the jury *how* that guilt must be proven (by legal evidence only), while the instruction on reasonable doubt tells the jury *how much* proof is required; secondly, that the crucial question in determining whether there is any "purging" function to be performed by an instruction on the presumption is whether there exists "a genuine danger that the jury [might] convict [the accused] on the basis of extraneous consideration, rather than on the evidence introduced at trial," ____ U. S. at ____—in *Taylor* the extraneous circumstances cited as creating a need for this purging effect were the prosecutor's reading of the indictment to the jury and his remarks during summation implying that the mere fact Taylor had been charged with a crime was evidence of his guilt; and finally, and most importantly for our purposes, that in answering the preceding question, the level of danger can be affected by the weight of the evidence for or against the accused—in Taylor the court specifically found that the risk was "heightened because the trial was essentially a swearing contest between the victim and the accused." *Id.*

If the danger that the jury might convict the accused on the basis of extraneous matters is increased where the case is close on the evidence, surely that danger must be decreased where the evidence against the accused is overwhelming in relation to the evidence in his favor. In the

case at hand, the indictment against Whorton was read into the record in the presence of the jury unaccompanied by an admonition that it was not to be considered as evidence. Immediately thereafter, there followed a parade of fifteen eyewitnesses who positively identified Whorton as the perpetrator of the crimes charged therein. Under these circumstances, I simply cannot believe there is any real possibility that the reading of the indictment could have affected either the jury's determination of guilt or punishment.

In closing I wish to emphasize that I do not believe that either *Taylor* or the decision reached by the majority today disturbs the time-honored and salutary rule in this jurisdiction prohibiting instructions on presumptions and inferences. For as pointed out in *Taylor* itself, the presumption of innocence, unlike the presumption of knowledge from possession of recently stolen goods, for example, is not really a true "presumption"—i.e., a mandatory inference drawn from a fact in evidence—at all, but is rather merely an "assumption" to be indulged in the absence of evidence to the contrary. ____ U. S. at ____ n. 12.

I would affirm each of Whorton's convictions except that involving wanton endangerment, which I agree is reversible on double jeopardy grounds.

RENDERED: JULY 25, 1978

SUPREME COURT OF KENTUCKY

78-SC-92-MR

HAROLD WHORTON - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Jefferson Circuit Court
Honorable S. Rush Nicholson, Judge
Indictment Nos. 157667, 157406 & 157391

DISSENTING OPINION BY JUSTICE STEPHENSON

I agree with the majority opinion to the extent of the holding that Whorton's use of a pistol in firing a shot into the ceiling of Jerry's Restaurant did not constitute a separate offense from the first-degree robbery charge. In all other respects I dissent.

The majority opinion oversimplifies my dissent. A careful reading of *Taylor* demonstrates to me that the failure to give a presumption of innocence instruction was held reversible error, primarly for the reason stated in *Taylor* that there was a risk that the jury would convict on the basis of the extraneous considerations mentioned in *Taylor* and "That risk was heightened because the trial essentially was a swearing contest between victim and accused." *Taylor* went on to state "the particular need for such an instruction in this case."

It is my view that with the equivocal language in *Taylor* the simple solution in this case is to apply the *Chapman-Harrington* test. Here we have three witnesses who identified Whorton in the robbery of the Doughnut Shop, two witnesses who identified Whorton in the robbery of the Burger Chef, ten witnesses who identified Whorton in the robbery of Jerry's and the arresting officers on the charge of wanton endangerment. The only defense offered at all was the testimony of Whorton's wife and sister who offered alibi testimony for the robbery of the Doughnut Shop. With Whorton not testifying we have a case for the prosecution that passes overwhelming evidence of guilt and reaches conclusive evidence of guilt. I do not believe that any thoughtful person would say that the failure to give a "presumption of innocence" instruction constituted unfair prejudice to Whorton. There can be no doubt at all that a conviction would have resulted if the instruction had been given; so, it follows that the error was harmless beyond a reasonable doubt, the basis of the Chapman-Harrington test.

Taylor does not pretend to hold that the constitutional right to a "presumption of innocence" instruction is so absolute that failure to give the instruction is reversible in all cases. It is my opinion that *Taylor* should be applied on a case by case basis depending on the circumstances in the particular case, and I am willing to handle the problem in this fashion rather than the rigid rule enunciated in the majority opinion which goes beyond the requirements of *Taylor*.

SUPREME COURT OF KENTUCKY

OPINION RENDERED JULY 25, 1978

HAROLD WHORTON

v.

COMMONWEALTH OF KENTUCKY

File No. 78-SC-92-MR

Appeal from Jefferson Circuit Court
Action No. 157406, 157667, 157391

MANDATE—Issued October 10, 1978

The Court being sufficiently advised, it seems the judgment herein is erroneous.

It is therefore considered that said judgment be reversed for proceedings consistent with the opinion herein; which is ordered to be certified to said court.

October 10, 1978 Appellee's Petition for Rehearing Denied.

(s) Martha Layne Collings
Clerk

SUPREME COURT OF KENTUCKY

File No. 78-SC-92-MR

HAROLD WHORTON - - - *Respondent-Appellant*

v.

COMMONWEALTH OF KENTUCKY - *Petitioner-Appellee*

Appeal from Jefferson Circuit Court
Hon. S. Rush Nicholson, Judge

PETITION FOR REHEARING AND MODIFICATION

ROBERT F. STEPHENS
Attorney General
PATRICK B. KIMBERLIN, III
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Counsel for Petitioner-Appellee

I hereby certify that a true copy of the within Petition for Rehearing and Modification has been mailed this 11th day of August, 1978, to Hon. S. Rush Nicholson, Judge, Jefferson Circuit Court, Hall of Justice, Louisville, Ky. 40202; Hon. David Armstrong, Commonwealth Attorney, Hall of Justice, Louisville, Ky. 40202; and Hon. Terrence R. Fitzgerald, Deputy Public Defender, 1000 Republic Bldg., Louisville, Ky. 40202, Counsel for Respondent-Appellant.

(s) Patrick B. Kimberlin, III
Assistant Attorney General

ARGUMENT

I.

This Court Erred in Determining That the Newly-Declared Constitutional Requirement of a Presumption of Innocence Instruction, When Requested, Is Not Subject to the Harmless Error Rule.

On May 30, 1978, the United States Supreme Court declared in *Taylor* v. *Kentucky, under the facts of that case,* that the refusal of the trial court to grant a requested instruction on presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Taylor* v. *Kentucky* (Slip Opinion, p. 12). Approximately one week later, on June 7, 1978, this Court held oral arguments in the instant case. Thereafter, on July 7, 1978, while this case was under submission, the Kentucky Court of Appeals rendered two opinions, not to be published as authority, rejecting the application of *Taylor* v. *Kentucky* and affirming the conviction of the accused in each case in light of the particular evidence and other characteristics which distinguish those cases from *Taylor.*[1]

On July 25, 1978, this Court rendered its Opinion in the instant case, giving thorough and thoughtful consideration to the recent case of *Taylor* v. *Kentucky, supra,* and the manner in which it affected the case at bar.[2] In its Opinion this Court concluded that the "newly-declared constitutional requirement" of a presumption of innocence instruction, when requested by the accused, must be given and if the

[1] *Gully* v. *Commonwealth*, File No. CA-2048-MR, and *Stewart* v. *Commonwealth*, File No. CA-1963-MR. (These cases are not cited as authority, but to apprise the Court chronologically of the impact of *Taylor* issues in this jurisdiction.) They are now pending on petitions for rehearing.

[2] This Court also reversed on that same day *Williams* v. *Commonwealth*, File No. 78-SC-68-MR and *Avery* v. *Commonwealth*, File No. 78-SC-75-MR, by Memorandum Opinion.

requested instruction is denied reversible error occurs. *Whorton* v. *Commonwealth,* Ky., ____ S. W. 2d ____ (Slip Opinion, p. 10). This Court considered but rejected the application of the *Chapman-Harrington* harmless error rule. The petitioner-appellee respectfully urges this Honorable Court to reconsider its holding insofar as the *Chapman-Harrington* rule is concerned and to modify its Opinion to hold that the *Chapman-Harrington* rule is applicable to this case.

CHAPMAN-HARRINGTON RULE

In *Chapman* v. *California,* 386 U. S. 18 (1967), the United States Supreme Court was confronted with a violation of an accused's constitutional rights under the Fifth and Fourteenth Amendments, but was requested to formulate and apply a harmless-error rule to the constitutional violation which would permit the conviction of the accused to be affirmed. In *Chapman* the accused urged the court to hold all federal constitutional errors, regardless of the facts and circumstances, to be deemed harmful requiring automatic reversal. The Supreme Court declined to adopt the accused's position and went on to formulate a harmless-error rule. The Supreme Court concluded that federal constitutional errors may be held harmless if the reviewing court is able to declare a belief that the error was harmless beyond a reasonable doubt. *Chapman* v. *California,* at 24.[3]

Two years later, in *Harrington* v. *California,* 395 U. S. 250 (1969), the Supreme Court affirmed the state conviction of an accused whose federal constitutional rights under the Sixth and Fourteenth Amendments had been violated at his state trial. The court, relying upon *Chapman,* applied the harmless-error rule and, when considering the overwhelming evidence presented at trial against the accused, con-

[3] In *Chapman* the conviction was reversed because the court was not of the opinion that the constitutional error was harmless beyond a reasonable doubt.

cluded that the federal constitutional violation would not require the reversal of his conviction. Thus, there is a clear policy enunciated by the United States Supreme Court, as reflected in the *Chapman-Harrington* rule, that outright violations of federal constitutional rights may be considered harmless depending upon the circumstances. The *Chapman-Harrington* rule has since been applied in nearly every jurisdiction, both state and federal, throughout the country.[4] With this in mind, the petitioner-appellee respectfully urges this Court to reconsider the facts of the case at bar in light of the harmless-error rule and also take note of the distinguishing characteristics between this case and *Taylor* v. *Kentucky*.

TAYLOR v. KENTUCKY

In its Opinion, this Court candidly acknowledges that a majority of its members would like to hold that the newly-declared constitutional requirement of a presumption of innocence instruction be subject to the harmless-error rule but hesitates to apply such a rule because "it might not stick." (Slip Opinion, p. 10). And, this Court questions whether the *Chapman-Harrington* harmless-error rule was intended to apply in a case such as this since the United States Supreme Court made no reference to that rule in its Opinion in *Taylor*. However, the petitioner-appellee respectfully urges this Court to avail itself of the *Chapman-Harrington* rule and apply it to the instant case.

If anything, the decision in *Taylor* v. *Kentucky* provides fertile ground for that rule to thrive with reference to cases such as the one at bar. The use of that rule will require consideration of cases such as the instant one on a case by

[4]In Kentucky, for example, this Court has seen fit to apply the *Chapman-Harrington* rule in such cases as *Burton* v. *Commonwealth*, Ky., 550 S. W. 2d 485, 488 (1977); *Cain* v. *Commonwealth*, Ky., 369 S. W. 2d 275 (1977); *Niemeyer* v. *Commonwealth*, Ky., 533 S. W. 2d 218, 221 (1976); also see *Watkins* v. *Commonwealth*, Ky., 465 S. W. 2d 245, 247 (1971).

case basis. But, this must be done in order that justice may be served. Petitioner-appellee estimates that there are approximately 22 cases involving *Taylor* issues currently pending before this Court or the Kentucky Court of Appeals. Moreover, petitioner-appellee would also estimate no fewer than 30 and perhaps as many as 60 or more cases throughout the Commonwealth involving *Taylor* issues which have yet to be appealed and briefed. As the *Whorton* Opinion currently stands, anywhere from 20 to perhaps 80 or more recent criminal convictions in this Commonwealth will have to be *automatically reversed*. Such a result does not serve the best interests of justice or the citizens of the Commonwealth *if* the harmless-error principle of *Chapman-Harrington* can be applied to these cases. Law students, lawyers and judges are very much aware of the adage that "good sense makes good law." Is it good sense to require automatic reversal in a large number of criminal cases, including the one at bar, where the very circumstances of each case, when considered on an individual basis, might require the application of the *Chapman-Harrington* rule and the affirmance of the conviction?

The consideration by the United States Supreme Court of the facts in *Taylor* v. *Kentucky* might best be described as unique. Perusal of that Opinion clearly establishes that the final determination of the violation of constitutional rights in refusing to give the requested instruction on presumption of innocence was predicated upon the numerous "extraneous circumstances" as noted by the Supreme Court. *Taylor* v. *Kentucky* (Slip Opinion, p. 10). Among those *extraneous circumstances*, as noted by the Supreme Court were:

1. the alleged skeletal instructions
2. the *possible* harmful inferences from references to the indictment

3. comments by the prosecutor, although not objected to, giving rise to inferences of the accused's guilt
4. suggestions of the accused's status as a defendant tending in itself to establish his guilt
5. the swearing contest between victim and accused. *Taylor* v. *Kentucky* (Slip Opinion, pp. 9-10).

It is the *facts* in the *Taylor* case which the Supreme Court again, and again, makes mention of and relies upon in establishing the basis of the constitutional violation in that case. The last paragraph of the majority opinion in that case simply crystalizes and acknowledges that the Opinion in *Taylor* was truly based *upon the facts of that case.*

Accordingly, this Court should not hesitate to apply the *Chapman-Harrington* rule to the instant case. The fact that that rule was not applied, or even mentioned, in *Taylor* is of course no consequence. Recourse to the briefs on the merits in *Taylor* indicate that the harmless-error rule was not brought to that court's attention. Similarly, petitioner-appellee has not urged upon this Court the application of the *Chapman-Harrington* rule until now. The application of that rule will provide true justice to both the accused and to the Commonwealth in any criminal case involving a presumption of innocence instruction.

The petitioner-appellee implores this Court to consider the evidence or record in the instant case where there are *three witnesses* who identified Whorton in the robbery of the Doughnut Shop, *two witnesses* who identified him in the robbery of the Burger Chef, *ten witnesses* who identified him at the robbery at Jerry's, and the arresting officers on the wanton endangerment charge. In defense, Whorton relied upon alibi testimony of relatives with respect to the robbery of the Doughnut Shop. This most surely constitutes overwhelming evidence of guilt. Under these circumstances, the petitioner-appellee respectfully requests this

Honorable Court to grant the Petition for Rehearing and to Modify its Opinion in the instant case applying the *Chapman-Harrington* rule hereto and affirming those convictions not otherwise reversed with respect to other issues in this case.

CONCLUSION

For the foregoing reasons, the petitioner-appellee respectfully requests this Honorable Court to grant the Petition for Rehearing and Modification.

Respectfully submitted,

Robert F. Stephens
Attorney General

(s) Patrick B. Kimberlin, III
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Counsel for Petitioner-Appellee

Supreme Court, U. S.
FILED
FEB 17 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-749

COMMONWEALTH OF KENTUCKY - Petitioner

versus

HAROLD WHORTON - - - - Respondent

On Writ of Certiorari to the Supreme Court
of the Commonwealth of Kentucky

APPENDIX

PETITION FOR CERTIORARI FILED
NOVEMBER 6, 1978
CERTIORARI GRANTED JANUARY 8, 1979

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

INDEX TO APPENDIX

	PAGE
Relevant Docket Entries as Indexed by the Jefferson Circuit Court Clerk's Office in Indictment Number 157391	1– 2
Relevant Docket Entries as Indexed by the Jefferson Circuit Court Clerk's Office in Indictment Number 157406	3
Relevant Docket Entries as Indexed by the Jefferson Circuit Court Clerk's Office in Indictment Number 157667	4– 5
Mandate Issued by the Supreme Court of Kentucky	6
Instructions Tendered at Trial by Harold Whorton	8–16
Instructions Given to the Jury	18–31
The Jury's Verdicts	33–40

RELEVANT DOCKET ENTRIES AS INDEXED BY THE JEFFERSON CIRCUIT COURT CLERK'S OFFICE IN INDICTMENT NUMBER 157391—Filed March 10, 1978

INDEX

SUBJECT	PAGE
Introduction	1
Indictment	2–5
Order to reduce bail, dated June 6, 1976	6
Motion and Order on the withdrawal of James Bryant as attorney, dated August 3, 1976	7
Motion for a Bill of Particulars with copy of order, dated September 7, 1976	8–11
Motion to Produce with copy of order, September 7, 1976	12–15
Response to Motion for Bill of Particulars, dated September 9, 1976	16–17
Response to Motion to Produce, dated September 9, 1976 Exhibit	18–19
Supplementary Response to Motion for Bill of Particulars and Motion to Produce, filed February 18, 1977	20–21
Defendant's motion for Leave to Withdraw Counsel, February 28, 1977	22–23
Motion to withdraw as counsel of record with copy of order and Affidavit, dated February 28, 1977	24–27
Motion to Determine the Attorney of Record with copy of order, filed in Open Court May 3, 1977	28–30
Motion to Grant Separate trial, filed May 16, 1977 with copy of order	31–32
Judgment entered September 29, 1977	33–34
Motion to Elect, filed in Open Court September 16, 1977	35
Motion to Separate Determination of Guilt Phase from Punishment Phase, Filed in Open Court	

SUBJECT PAGE
September 20, 1977 with Memorandum of Authorities—Exhibit 36–39
Motion for Hearing Outside Presence Of Jury Regarding Admissibility of Identification Testimony, filed in Open Court September 20, 1977 40–41
Motion to Suppress, filed in Open Court September 20, 1977 42
Motion for Arrest of Judgment to Set Aside Verdict, and for new Trial, dated September 20, 1977 43–44
Order on Memorandum Regarding Motion for Arrest of Judgment to Set Aside Verdict, and for New Trial, dated September 26, 1977 45–46
Motion and Order on Substitution of Photograph for Money Held as Evidence, filed in Open Court September 29, 1977 47–48
Notice of Appeal dated October 7, 1977 49
Motion to Proceed with Appeal in Forma Pauperis, dated October 7, 1977 50
Motion for Extension of Time, dated December 6, 1977 51–52
CERTIFICATE ..... LAST PAGE

RELEVANT DOCKET ENTRIES AS INDEXED BY THE JEFFERSON CIRCUIT COURT CLERK'S OFFICE IN INDICTMENT NUMBER 157406—Filed March 10, 1978

INDEX

SUBJECT PAGE
Introduction 1
Indictment 2
Response to Motion for Bill of Particulars, dated September 13, 1976 ..... 3– 4
Response to Motion to Produce, dated September 13, 1976 ..... 5– 6
Motion to Determine the Attorney of Record, filed in Open Court May 3, 1977, with copy of order 7– 8
Motion to Separate Determination of Guilt Phase from Punishment Phase, and Memorandum of Authorities, filed in Open Court September 20, 1977—Exhibit 9–12
Motion to Suppress Evidence seized from defendant's car, filed in open Court September 20, 1977 13
Motion for Hearing Outside Presence of Jury Regarding Admissibility of Identification Testimony, filed in Open Court September 20, 1977 14–15
Motion for Arrest of Judgment to Set Aside Verdict, and for New Trial, dated September 26, 1977 16–17
Order on Memorandum Regarding Motion for Arrest of Judgment to Set Aside Verdict, and for New Trial, September 29, 1977 18–19
Judgment entered September 29, 1977 20
Notice of Appeal, dated October 7, 1977 21
Motion to Proceed with Appeal in Forma Pauperis, Dated October 7, 1977 22
Motion for Extension of Time, dated December 6, 1977 23–24
CERTIFICATE ..... LAST PAGE

RELEVANT DOCKET ENTRIES AS INDEXED BY THE JEFFERSON CIRCUIT COURT CLERK'S OFFICE IN INDICTMENT NUMBER 157667—Filed March 10, 1978

INDEX

SUBJECT	PAGE
Introduction	1
Indictment	2–3
Motion for a Bill of Particulars with a copy of Order dated October 15, 1976	4–7
Motion to Produce, with copy of Order, filed October 14, 1976	8–12
Response to Motion for Bill of Particulars, dated December 9, 1976	13–14
Response to Motion to Produce, dated December 9, 1976	15
Defendant's Motion Pro se to Suppress Evidence	16–17
Motion to Determine the Attorney of Record, Filed in Open Court May 3, 1977 with copy of Order	18–20
Motion for Competency Hearing, dated September 15, 1977	21–22
Affidavit on defendant's military service record, and attached letter, dated September 14, 1977	23–25
Motion to Separate Determination of Guilt Phase From Punishment Phase, Filed in open Court, September 20, 1977 Memorandum of Authorities—Exhibit	26–29
Motion to Dismiss, Filed in Open Court	30
Motion to Suppress Evidence, Filed in Open Court September 20, 1977	31
Motion In Limine, Filed in Open Court, September 20, 1977	32
Motion for Hearing Outside Presence of Jury Regarding Admissibility of Identification Testimony, Filed in Open Court September 20, 1977	33–34

SUBJECT	PAGE
Instructions of the Court	35–62
Motion for Arrest of Judgment to Set Aside Verdict, and for New Trial, Filed in Open Court September 26, 1977	63–64
Order on Memorandum Regarding Motion for Arrest of Judgment to Set Aside Verdict, and for New Trial, dated September 26, 1977	65–66
Judgment entered September 29, 1977	67
Motion to Proceed with Appeal in Forma Pauperis, Filed in Open Court October 7, 1977	68
Notice of Appeal, Filed in Open Court October 7, 1977.	69
Motion for Extension of Time, dated December 6, 1977	70–71
CERTIFICATE	LAST PAGE
CERTIFICATE	LAST PAGE

SUPREME COURT OF KENTUCKY

OPINION RENDERED JULY 25, 1978

HAROLD WHORTON

v.

COMMONWEALTH OF KENTUCKY

File No. 78-SC-92-MR

Appeal from Jefferson Circuit Court
Action No. 157406, 157667, 157391

MANDATE—Issued October 10, 1978

The Court being sufficiently advised, it seems the judgment herein is erroneous.

It is therefore considered that said judgment be reversed for proceedings consistent with the opinion herein; which is ordered to be certified to said court.

October 10, 1978 Appellee's Petition for Rehearing Denied.

(s) Martha Layne Collins
Clerk

INSTRUCTIONS TENDERED AT TRIAL BY HAROLD WHORTON

JEFFERSON CIRCUIT COURT

CRIMINAL BRANCH, FOURTEENTH DIVISION

No. 157391
157406
157667

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

HAROLD WHORTON - - - - - *Defendant*

DEFENDANT'S REQUESTED INSTRUCTION No. 1

The jury is advised that:

1. Only matters properly before the jury as a whole may be considered. A member should not, for instance, be influenced by any knowledge of the acts, character, or service of the accused not based on the evidence or other proper matter before the jury; by any opinions not properly in evidence; or by motives of partiality, favor, or affection. In weighing the evidence a member is expected to utilize his common sense and his knowledge of human nature and of the ways of the world. In the light of all the circumstances of the case, he should consider the inherent probability or improbability of the evidence.

2. As members of the jury you are required to determine the credibility of the witnesses, that is, their worthiness of belief. In judging the credibility of the witnesses in this proceeding, you should carefully weigh the testimony given, and in so doing, consider all the circumstances under which any witness has testified; his demeanor and

manner while on the stand; the acuteness of his powers of observation; his interest, if any, in the outcome of the case; his friendships and prejudices; the extent to which he is contradicted or corroborated by other credible evidence, if at all; and any circumstances that tend to shed light upon his credibility, taking into account your own experience in dealing with people.

3. A member may properly believe one witness and disbelieve several witnesses whose testimony is in conflict with that of the one. You should reconcile the evidence in this case in accordance with the weight and credibility which you, in your best judgment determine should be given to the testimony of each witness (and to each other item of evidence). You should not disregard the testimony of any witness without due consideration.

4. The law presumes an accused to be innocent of crime. He begins the trial with a clean slate, with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit an accused unless the jury members are satisfied beyond a reasonable doubt of the accused's guilt from all the evidence in the case.

5. A reasonable doubt is a fair doubt based upon reason and common sense and arising from the state of the evidence. It is rarely possible to prove anything to an absolute certainty. The meaning of the rule is that the proof must be such as to exclude, not every hypothesis or possibility of innocence, but any fair and rational hypothesis except that of guilt; what is required is not an absolute or mathematical certainty but a moral certainty. An accused is not to be convicted on mere suspicion or conjecture. A reasonable doubt may arise, not only from the evidence produced, but also from a lack of evidence. Since

the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, an accused has the right to rely upon failure of the prosecution to establish such proof. (An accused may also rely upon evidence brought out on cross-examination of witnesses for the prosecution.) The law does not impose upon an accused the duty of producing any evidence. A reasonable doubt exists in any case when, after careful and impartial consideration of all the evidence, the jury members do not feel convinced to a moral certainty that an accused is guilty of the offense(s) charged.

The final determination as to the weight of the evidence in this case rests solely upon you members of the jury. You must disregard any comment or statement made by me during the course of the trial which may seem to indicate an opinion as to the guilt or innocence of the accused, for you alone have the independent responsibility of deciding that issue. Each of you must impartially resolve the ultimate issue as to the guilt or innocence of the accused in accordance with the law, the evidence admitted in court, and your own conscience.

I must caution you also against interpreting any comment, statement, ruling or instruction which I have given during this trial as indicating that the accused has the burden of proving his innocence. On the contrary, the burden is always on the Government to prove the accused guilty beyond a reasonable doubt, and this burden of proof never shifts throughout the trial.

Reference: Air Force Manual 111-2, 15 October 1971; *United States* v. *Trotter,* 15 USCMA 218, 35 CMR 190 (1965); *United States* v. *Boswell,* 8 USCMA 145, 23 CMR 369 (1957). See also *United States* v. *Rinehart,* 8 USCMA 402, 24 CMR 212 (1957). *United States* v. *Offley, et al.,* 3 USCMA 276, 12 CMR 32 (1953); *United States* v. *Moore,* 4 USCMA 482, 16 CMR 56 (1954).

(s) John B. Southard, Jr.
Assistant District Defender
Office of the Jefferson District
Public Defender
1000 Republic Building
Louisville, Kentucky 40202

CERTIFICATE

I do hereby certify that a copy of the foregoing was delivered to the Commonwealth's Attorney, or his agent, on this 21st day of September, 1977.

(s) John B. Southard, Jr.

JEFFERSON CIRCUIT COURT

CRIMINAL BRANCH, FOURTEENTH DIVISION

No. 157391
157406
157667

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

HAROLD WHORTON - - - - - *Defendant*

INSTRUCTION No. 2

The jury is advised that:

The defense has introduced evidence which may tend to show that the accused could not have committed the offenses charged in indictments 157406 and 157667 charging incidents at the Krispy Creme Doughnut Shop, on May 15, 1976, and the Burger Chef Restaurant on May 25, 1976, because he was at another place at the time the offense was allegedly committed. This is known as an alibi. An alibi is one of the most perfect and conclusive means of establishing innocence, since an accused who was not present at the time of an alleged offense could not have committed it. The burden is on the prosecution to establish beyond a reasonable doubt that the accused was present at the scene of the offense at the time it was committed. Consequently, unless you are satisfied beyond a reasonable doubt that the accused was present, you must acquit him.

Reference: Air Force Manual 111-2, 15 October 1971; *United States* v. *Moore*, 15 USCMA 345, 35 CMR 317 (1965); *United States* v. *Bigger*, 2 USCMA 297, 8 CMR 97 (1953).

(s) John B. Southard, Jr.
Assistant District Defender
Office of the Jefferson District
Public Defender
1000 Republic Building
Louisville, Kentucky 40202

CERTIFICATE

I do hereby certify that a copy of the foregoing was delivered to the Commonwealth's Attorney, or his agent, on this 21st day of September, 1977.

(s) John B. Southard, Jr.

JEFFERSON CIRCUIT COURT

CRIMINAL BRANCH, SIXTEENTH DIVISION

No. 157391
157406
157667

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

HAROLD WHORTON - - - - - *Defendant*

INSTRUCTION No. 3

One of the most important issues in this case is the identification of the defendant as the perpetrator of the crime. The Commonwealth has the burden of proving identity beyond a reasonable doubt. It is not essential that the witness himself be free from doubt as to the correctness of his statement. However, you, the jury must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict him. If you are not convinced beyond a reasonable doubt that the defendant is the person who committed the crime, you must find the defendant not guilty.

Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later.

In appraising the identification testimony of a witness, you should consider the following:

(a) Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?

Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had had occasion to see or know the person in the past.

(b) Are you satisfied that the identification made by the witness subsequent to the offense was the product of his own recollection? You may take into account both the strength of the identification, and the circumstances under which the identification was made.

If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see defendant, as a factor bearing on the reliability of the identification.

You may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness.

(c) Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether he is truthful, and consider whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony.

I again emphasize that the burden of proof on the prosecutor extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the

perpetrator of the crime with which he stands charged. If after examining the testimony, you have reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty.

Respectfully submitted,

(s) John B. Southard, Jr.
Assistant District Defender
Office of the Jefferson District
Public Defender
1000 Republic Building
Louisville, Kentucky 40202

CERTIFICATE

I do hereby certify that a copy of the foregoing was delivered to the Commonwealth's Attorney, or his agent, on this 21st day of September, 1977.

(s) John B. Southard, Jr.

INSTRUCTIONS GIVEN TO THE JURY

[T.R. 35]

JEFFERSON CIRCUIT COURT

FOURTEENTH DIVISION

Nos. 157667
157406
157391

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

HAROLD WHORTON - - - - - *Defendant*

INSTRUCTIONS

Instruction No. I—You will find the defendant Harold Whorton guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in Jefferson County, Kentucky, on or about the 23rd of May 1976, and before the finding of the indictment herein, the defendant stole a sum of money from Burger Chef Restaurant at 4975 Shelbyville Road;

(b) That in the course of so doing and with intent to accomplish the theft, the defendant threatened the immediate use of physical force upon Jack Cole, an employee, by pointing a pistol at him;

AND

(c) That said pistol was a deadly weapon or was a "dangerous instrument" as defined in Instruction No. 17

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than ten (10) years nor more than twenty (20) years, in your discretion.

[T.R. 36]

Instruction No. II—You will find the defendant Harold Whorton guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in Jefferson County, Kentucky, on or about the 15th of May 1976, and before the finding of the indictment herein, the defendant stole property and a sum of money from the Krispy Kreme Doughnut Shop at 3920 South Seventh Street Road;

(b) That in the course of so doing and with intent to accomplish the theft of the Krispy Kreme Doughnut Shop, the defendant threatened the immediate use of physical force upon Charles Sanders and other employees by pointing a pistol at them;

AND

(c) That said pistol was a deadly weapon or was a "dangerous instrument" as defined in Instruction No. 17

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than ten (10) years nor more than twenty (20) years, in your discretion.

[T.R. 37]

Instruction No. III—You will find the defendant Harold Whorton guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in Jefferson County, Kentucky, on or about the 15th of May 1976, and before the finding of the indictment herein, the defendant stole a sum of money from Charles Sanders;

(b) That in the course of so doing and with intent to accomplish the theft, the defendant threatened the immediate use of physical force upon Charles Sanders by pointing a pistol at him;

AND

(c) That said pistol was a deadly weapon or was a "dangerous instrument" as defined in Instruction No. 17

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than ten (10) years nor more than twenty (20) years, in your discretion.

[T.R. 38]

Instruction No. IV—You will find the defendant Harold Whorton guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in Jefferson County, Kentucky, on or about the 15th of May 1976, and before the finding of the indictment herein, the defendant stole a sum of money from James Toohey;

(b) That in the course of so doing and with intent to accomplish the theft, the defendant threatened the immediate use of physical force upon James Toohey by pointing a pistol at him;

AND

(c) That said pistol was a deadly weapon or was a "dangerous instrument" as defined in Instruction No. 17

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than ten (10) years nor more than twenty (20) years, in your discretion.

[T.R. 39]

Instruction No. V—You will find the defendant Harold Whorton guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in Jefferson County, Kentucky, on or about the 15th of May 1976, and before the finding of the indictment herein, the defendant stole a sum of money from Harold Lovell;

(b) That in the course of so doing and with intent to accomplish the theft, the defendant threatened the immediate use of physical force upon Harold Lovell by pointing a pistol at him;

AND

(c) That said pistol was a deadly weapon or was a "dangerous instrument" as defined in Instruction No. 17

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than ten (10) years nor more than twenty (20) years, in your discretion.

[T.R. 40]

Instruction No. VI—You will find the defendant Harold Whorton guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in Jefferson County, Kentucky, on or about the 1st of June 1976, and before the finding of the

indictment herein, the defendant stole a sum of money from Jerry's Restaurant at 2106 Brownsboro Road;

(b) That in the course of so doing and with intent to accomplish the theft, the defendant threatened the immediate use of physical force upon David Schaublin and other employees by pointing a pistol at them;

AND

(c) That said pistol was a deadly weapon or was a "dangerous instrument" as defined in Instruction No. 17

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than ten (10) years nor more than twenty (20) years, in your discretion.

[T.R. 41]

Instruction No. VII—You will find the defendant Harold Whorton guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in Jefferson County, Kentucky, on or about the 1st of June 1976, and before the finding of the indictment herein, the defendant stole a sum of money from John Sellinger;

(b) That in the course of so doing and with intent to accomplish the theft, the defendant threatened the immediate use of physical force upon John Sellinger by pointing a pistol at him;

AND

(c) That said pistol was a deadly weapon or was a "dangerous instrument" as defined in Instruction No. 17

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than ten (10) years nor more than twenty (20) years, in your discretion.

[T.R. 42]

Instruction No. VIII—You will find the defendant Harold Whorton guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in Jefferson County, Kentucky, on or about the 1st of June 1976, and before the finding of the indictment herein, the defendant stole a sum of money from Michael Golder;

(b) That in the course of so doing and with intent to accomplish the theft, the defendant threatened the immediate use of physical force upon Michael Golder by pointing a pistol at him;

AND

(c) That said pistol was a deadly weapon or was a "dangerous instrument" as defined in Instruction No. 17.

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than ten (10) years nor more than twenty (20) years, in your discretion.

[T.R. 43]

Instruction No. IX—You will find the defendant Harold Whorton guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in Jefferson County, Kentucky, on or about the 1st of June 1976, and before the finding of the in-

dictment herein, the defendant stole a sum of money from Lillian Cheek;

(b) That in the course of so doing and with intent to accomplish the theft, the defendant threatened the immediate use of physical force upon Lillian Cheek by pointing a pistol at her;

AND

(c) That said pistol was a deadly weapon.

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than ten (10) years nor more than twenty (20) years, in your discretion.

[T.R. 44]

Instruction No. X—You will find the defendant Harold Whorton guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in Jefferson County, Kentucky, on or about the 1st of June 1976, and before the finding of the indictment herein, the defendant stole a sum of money from David Voling;

(b) That in the course of so doing and with intent to accomplish the theft, the defendant threatened the immediate use of physical force upon David Voling by pointing a pistol at him;

AND

(c) That said pistol was a deadly weapon.

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than ten (10) years nor more than twenty (20) years, in your discretion.

[T.R. 45]

Instruction No. XI—You will find the defendant Harold Whorton guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in Jefferson County, Kentucky, on or about the 1st of June 1976, and before the finding of the indictment herein, the defendant stole a sum of money from Charles Cheek;

(b) That in the course of so doing and with intent to accomplish the theft, the defendant threatened the immediate use of physical force upon Charles Cheek by pointing a pistol at him;

AND

(c) That said pistol was a deadly weapon.

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than ten (10) years nor more than twenty (20) years, in your discretion.

[T.R. 46]

Instruction No. XIA—You will find the defendant Harold Whorton guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in Jefferson County, Kentucky, on or about the 1st of June 1976, and before the finding of the indictment herein, the defendant intended to accomplish a theft of property from Charles Cheek;

(b) That in the course of so doing, and with the intent to accomplish a theft, the defendant threatened the

immediate use of physical force upon Charles Cheek by pointing a pistol at him;

AND

(c) That said pistol was a deadly weapon.

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than five (5) years nor more than ten (10) years, in your discretion.

[T.R. 47]

Instruction No. XII—You will find the defendant Harold Whorton guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in Jefferson County, Kentucky, on or about the 1st of June 1976, and before the finding of the indictment herein, the defendant stole property from Heidi Watley;

(b) That in the course of so doing and with intent to accomplish the theft, the defendant threatened the immediate use of physical force upon Heidi Watley by pointing a pistol at her;

AND

(c) That said pistol was a deadly weapon.

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than ten (10) years nor more than twenty (20) years, in your discretion.

[T.R. 48]

Instruction No. XIIA—You will find the defendant Harold Whorton guilty under this instruction if, and only

if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in Jefferson County, Kentucky, on or about the 1st of June 1976, and before the finding of the indictment herein, the defendant intended to accomplish a theft of property from Heidi Watley;

(b) That in the course of so doing, and with the intent to accomplish a theft, the defendant threatened the immediate use of physical force upon Heidi Watley by pointing a pistol at her;

AND

(c) That said pistol was a deadly weapon.

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than five (5) years nor more than ten (10) years, in your discretion.

[T.R. 49]

Instruction No. XIII—You will find the defendant Harold Whorton guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in Jefferson County, Kentucky, on or about the 1st of June 176, and before the finding of the indictment herein, the defendant threatened the use of, pointed and shot a pistol within close proximity of several persons at the Jerry's Restaurant at 2106 Brownsboro Road, and that he thereby wantonly created a substantial danger of death or serious physical injury to them;

(b) That under the circumstances such conduct manifested extreme indifference to the value of human life.

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than one (1) year nor more than five (5) years, in your discretion.

Instruction No. XIV—If you do not find the defendant guilty under Instruction No. XIII, you will find him guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in Jefferson County, Kentucky, on or about the 1st of June 1976, and within twelve months before the issuance of the finding of the indictment herein, he wantonly threatened the use of, pointed and shot a pistol within close proximity of several persons at the Jerry's Restaurant at 2106 Brownboro Road,

AND

(b) That he thereby wantonly created a substantial danger of physical injury to them.

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the county jail for a period not to exceed twelve months, at a fine not to exceed $500.00, or at both confinement and fine, in your discretion.

[T.R. 50]

Instruction No. XV—You will find the defendant Harold Whorton guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in Jefferson County, Kentucky, on or about the 1st of June 1976, and before the finding of the indictment herein, the defendant threatened the use of and pointed a pistol at Officer Tom Jenkins of the Louisville Police Department, and that he thereby wantonly created a substantial danger of death or serious physical injury to him;

AND

(b) That under the circumstances such conduct manifested extreme indifference to the value of human life.

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than one (1) year nor more than five (5) years, in your discretion.

Instruction No. XVI—If you do not find the defendant guilty under Instruction No. XV, you will find him guilty under this instruction if, and only, you believe the evidence beyond a reasonable doubt all of the following:

(a) That in Jefferson County, Kentucky, on or about the 1st of June 1976, and within twelve months before the issuance of the finding of the indictment herein, he wantonly threatened the use of and pointed a pistol at Officer Tom Jenkins of the Louisville Police Department;

AND

(b) That he thereby wantonly created a substantial danger of physical injury to him.

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the county jail for a period not to exceed twelve months, at a fine not to exceed $500.00, or at both confinement and fine, in your discretion.

[T.R. 51]

Instruction No. XVII—Definitions

(a) "Dangerous instrument"—means any instrument which under the circumstances in which it is used, at-

tempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury.

(b) "Wantonly"—a defendant acts wantonly with respect to another's death or physical injury when he is aware of and consciously disregards a substantial and unjustifiable risk that death or physical injury will occur. In order to be "substantial and unjustifiable" the risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

(c) "Serious physical injury"—means physical injury which creates a substantial risk of death or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ.

(d) "Physical injury"—means substantial physical pain or any impairment of physical condition.

Instruction No. XVIII—If upon the whole case you have a reasonable doubt as to the defendant's guilt, you shall find him not guilty. The term reasonable doubt as used in these instructions means a substantial doubt, a real doubt, in that you must ask yourself not whether a better case might have been proven but whether, after hearing all the evidence, you actually doubt that the defendant is guilty.

Concerning Instruction Nos. XIII and XIV—If you find the defendant guilty but have a reasonable doubt as to the degree of the offense of which he is guilty you shall find him guilty of the lower degree. Instruction No. XIII is the higher degree and Instruction No. XIV is the lower degree.

Concerning Instruction Nos. XV and XVI—If you find the defendant guilty but have a reasonable doubt as to the degree of the offense of which he is guilty you shall find him guilty of the lower degree. Instruction No. XV is the higher degree and Instruction No. XVI is the lower degree.

[T.R. 52]

Instruction No. XIX—Under the evidence presented to you in this case, you may find the defendant not guilty of all or some of the charges; or you may find the defendant guilty of all or some of the charges.

Instruction No. XX—The verdict of the jury must be unanimous and be signed by one of you as foreman. You may use one of the form provided at the end of these instructions in writing your verdict.

(s) S. Rush Nicholson
Judge S. Rush Nicholson

THE JURY'S VERDICTS

[T.R. 53]

VERDICT No. 1

We, the Jury, find the defendant Harold Whorton not guilty under Instruction No. I.

_____

Foreman

VERDICT No. 2

We, the Jury, find the defendant Harold Whorton guilty under Instruction No. I and fix his punishment at confinement in the penitentiary for 20 years.

(indicating the punishment)

(s) James E. Kidwell
Foreman

VERDICT No. 3

We, the Jury, find the defendant Harold Whorton not guilty under Instruction No. II

_____

Foreman

VERDICT No. 4

We, the Jury, find the defendant Harold Whorton guilty under Instruction No. II and fix his punishment at confinement in the penitentiary for 20 years.

(indicating the punishment)

(s) James E. Kidwell
Foreman

[T.R. 54]

VERDICT No. 5

We, the Jury, find the defendant Harold Whorton not guilty under Instruction No. III.

_____

Foreman

VERDICT No. 6

We, the Jury, find the defendant Harold Whorton guilty under Instruction No. III and fix his punishment at confinement in the penitentiary for 20 years.

(indicating the punishment)

(s) James E. Kidwell
Foreman

VERDICT No. 7

We, the Jury, find the defendant Harold Whorton not guilty under Instruction No. IV.

_____

Foreman

VERDICT No. 8

We, the Jury, find the defendant Harold Whorton guilty under Instruction IV and fix his punishment at confinement in the penitentiary for 20 years.

(indicating the punishment)

(s) James E. Kidwell
Foreman

[T.R. 55]

VERDICT No. 9

We, the Jury, find the defendant Harold Whorton not guilty under Instruction No. V.

_____

Foreman

VERDICT No. 10

We, the Jury, find the defendant Harold Whorton guilty under Instruction No. V and fix his punishment at confinement in the penitentiary for 20 years.

(indicating the punishment)

(s) James E. Kidwell
Foreman

VERDICT No. 11

We, the Jury, find the defendant Harold Whorton not guilty under Instruction No. VI.

_____

Foreman

VERDICT No. 12

We, the Jury, find the defendant Harold Whorton guilty under Instruction No. VI and fix his punishment at confinement in the penitentiary for 20 years.

(indicating the punishment)

(s) James E. Kidwell
Foreman

[T.R. 56]

VERDICT No. 13

We, the Jury, find the defendant Harold Whorton not guilty under Instruction No. VII.

_____

Foreman

VERDICT No. 14

We, the Jury, find the defendant Harold Whorton guilty under Instruction No. VII and fix his punishment at confinement in the penitentiary for 20 years.

(indicating the punishment)

(s) James E. Kidwell
Foreman

VERDICT No. 15

We, the Jury, find the defendant Harold Whorton not guilty under Instruction No. VIII.

_____

Foreman

VERDICT No. 16

We, the Jury, find the defendant Harold Whorton guilty under Instruction No. VIII and fix his punishment at confinement in the penitentiary for 20 years.

(indicating the punishment)

(s) James E. Kidwell
Foreman

[T.R. 57]

VERDICT No. 17

We, the Jury, find the defendant Harold Whorton not guilty under Instruction No. IX.

_____

Foreman

VERDICT No. 18

We, the Jury, find the defendant Harold Whorton guilty under Instruction No. IX and fix his punishment at confinement in the penitentiary for 20 years.

(indicating the punishment)

(s) James E. Kidwell
Foreman

VERDICT No. 19

We, the Jury, find the defendant Harold Whorton not guilty under Instruction No. X.

_____

Foreman

VERDICT No. 20

We, the Jury, find the defendant Harold Whorton guilty under Instruction No. X and fix his punishment at confinement in the penitentiary for 20 years.

(indicating the punishment)

(s) James E. Kidwell
Foreman

[T.R. 58]

VERDICT No. 21

We, the Jury, find the defendant Harold Whorton not guilty under Instruction No. XI.

(s) James E. Kidwell
Foreman

VERDICT No. 22

We, the Jury, find the defendant Harold Whorton guilty under Instruction No. XI and fix his punishment at confinement in the penitentiary for _____ years.

(indicating the punishment)

_____

Foreman

VERDICT No. 23

We, the Jury, find the defendant Harold Whorton not guilty under Instruction No. XIA.

_____

Foreman

VERDICT No. 24

We, the Jury, find the defendant Harold Whorton guilty under Instruction No. XIA and fix his punishment at confinement in the penitentiary for 10 years.

(indicating the punishment)

(s) James E. Kidwell
Foreman

[T.R. 59]

We, the Jury, find the defendant Harold Whorton not guilty under Instruction No. XII.

(s) James E. Kidwell
Foreman

We, the Jury, find the defendant Harold Whorton guilty under Instruction No. XII and fix his punishment at confinement in the penitentiary for_____years.
(indicating the punishment)

_____
Foreman

We, the Jury, find the defendant Harold Whorton not guilty under Instruction No. XIIA.

_____
Foreman

We, the Jury, find the defendant Harold Whorton guilty under Instruction No. XIIA and fixe his punishment at confinement in the penitentiary for 10 years.
(indicating the punishment)

(s) James E. Kidwell
Foreman

[T.R. 60]

VERDICT No. 25

We, the Jury, find the defendant Harold Whorton not guilty under Instruction No. XIII.

_____
Foreman

VERDICT No. 26

We, the Jury, find the defendant Harold Whorton guilty under Instruction No. XIII and fix his punishment at confinement in the penitentiary for 5 years.
(indicating the punishment)

(s) James E. Kidwell
Foreman

VERDICT No. 27

We, the Jury, find the defendant Harold Whorton not guilty under Instruction No. XIV.

_____
Foreman

VERDICT No. 28

(a) We, the Jury, find the defendant Harold Whorton guilty under Instruction No. XIV and fix his punishment at confinement in the County Jail for _____ months and a fine of $_____.

_____
Foreman

(b) We, the Jury, find the defendant Harold Whorton guilty under Instruction No. XIV and fix his punishment at confinement in the County Jail for _____ months.

_____
Foreman

[T.R. 61]

(c) We, the Jury, find the defendant Harold Whorton guilty under Instruction No. XIV and fix his punishment at a fine of $_____.

_____
Foreman

VERDICT No. 29

We, the Jury, find the defendant Harold Whorton not guilty under Instruction No. XV.

_____
Foreman

VERDICT No. 30

We, the Jury, find the defendant Harold Whorton guilty under Instruction No. XV and fix his punishment at confinement in the penitentiary for 5 years.
(indicating the punishment)

(s) James E. Kidwell
Foreman

VERDICT No. 31

We, the Jury, find the defendant Harold Whorton not guilty under Instruction No. XVI.

_____

Foreman

[T.R. 62]

VERDICT No. 32

(a) We, the Jury, find the defendant Harold Whorton guilty under Instruction No. XVI and fix his punishment at confinement in the County Jail for _____ months and a fine of $_____.

_____

Foreman

(b) We, the Jury, find the defendant Harold Whorton guilty under Instruction No. XVI and fix his punishment at confinement in the County Jail for _____ months.

_____

Foreman

(c) We, the Jury, find the defendant Harold Whorton guilty under Instruction No. XVI and fix his punishment at a fine of $_____.

_____

Foreman

_____

Judge S. Rush Nicholson

Supreme Court U. S.
FILED
NOV 16 197
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

NO. 78-749, Misc., October Term 1978

COMMONWEALTH OF KENTUCKY
Petitioner

V. MOTION TO PROCEED IN FORMA PAUPERIS

HAROLD WHORTON
Respondent

Comes Terrence R. Fitzgerald, counsel for the respondent, and states that the respondent has proceeded as a pauper without the payment of fees and costs throughout the proceedings in the state court below, that the respondent has been found by the Jefferson District Public Defender and the state courts to qualify as an indigent and to have appointed counsel throughout the proceedings below, that counsel was appointed by the Jefferson Circuit Court to represent the respondent, and he is therefore entitled to proceed herein without prepayment of fees, costs or security herein. An affidavit of indigency and an order of the Jefferson Circuit Court permitting the respondent to proceed in forma pauperis in the state courts are attached hereto.

CERTIFICATE

I do hereby certify that a copy of this motion was served by depositing the same in a United States mail box, with first class postage prepaid, to Hon. Patrick B. Kimberlin, III, Assistant Attorney General of Kentucky, Capitol Building, Frankfort, Kentucky 40601, on November 15, 1978.

Terrence R. Fitzgerald
TERRENCE R. FITZGERALD
CHIEF APPELLATE DEFENDER OF THE
JEFFERSON DISTRICT PUBLIC DEFENDER
200 CIVIC PLAZA
701 WEST JEFFERSON STREET
LOUISVILLE, KENTUCKY 40202
(502) 587-3800
COUNSEL FOR PETITIONER

NO. 157391
157406
157667

JEFFERSON CIRCUIT COURT

CRIMINAL BRANCH

FOURTEENTH DIVISION

FILED IN OPEN COURT

OCT 7 1977

PAULIE MILLER, Clerk

By Charles E. Talbert
Deputy Clerk

COMMONWEALTH OF KENTUCKY — PLAINTIFF

V.

MOTION TO PROCEED WITH APPEAL

IN FORMA PAUPERIS

HAROLD WHORTON — DEFENDANT

* * * * * * * * *

Comes the defendant, by counsel, and states that he is a poor person and unable to pay attorney fees or costs of an appeal or give security thereof, and he is therefore entitled to proceed in forma pauperis and to have counsel appointed for the purpose of this appeal.

WHEREFORE, the defendant moves the Court to enter the order set out below.

CERTIFICATE

This is to certify that a copy of the foregoing was duly served on the Commonwealth's attorney, or his agent, on this the 7th day of OCTOBER, 1977.

John B. Southard, Jr.

JOHN B. SOUTHARD, JR.
ASSISTANT DISTRICT DEFENDER
Office of the Jefferson District
Public Defender
1000 Republic Building
Louisville Kentucky 40202

O R D E R

IT IS HEREBY ORDERED that the defendant, Harold Whorton, be permitted to proceed in forma pauperis, on appeal, and the Jefferson District Public Defender is hereby appointed as counsel for the defendant for the purpose of the appeal.

ENTERED Oct. 7, 1977

JUDGE

IN THE SUPREME COURT OF THE UNITED STATES

NO. 78-749, Misc., October Term 1978

AFFIDAVIT OF INDIGENCY

Supreme Court, U. S.
FILED
NOV 27 1978
MICHAEL RODAK, JR., CLERK

COMMONWEALTH OF KENTUCKY
COUNTY OF JEFFERSON

Comes the affiant, Harold Whorton (NMI),

being first duly sworn, and says as provided in KRS 31.120, that he is not now represented by private counsel and that he does not have the money or assets out of which to employ one; that he is indigent and requests the court to appoint counsel.

Affiant states that his income is $8.50 PER MO. EIGHT DOLLARS AND FIFTY CENTS PER MONTH; that he owns the following property:

Description	Value
None	0
None	0
None	0

that he has the following dependents:

Name	Age	Relationship
Lillie P. Whorton	32	Wife
Derrell Whorton	15	Son
Patricia Whorton	12	Daughter
David Whorton	11	Son
Lisa Whorton	8	Daughter

and that he has the following obligations:

To Whom Owed	Amount Owing
None	0

Harold Whorton
Signature of Affiant

Subscribed and sworn to before me this 15 day of Nov., 1978.

John R Shep
NOTARY PUBLIC
STATE-AT-LARGE

My Commission Expires: 28 July 1980

*******Any person making false statements in the above affidavit shall be subject to the penalties for perjury under KRS Chapter 523, the maximum penalty for which is five years imprisonment.

IN THE SUPREME COURT OF THE UNITED STATES

NO. 78-749, Misc., October Term 1978

COMMONWEALTH OF KENTUCKY
Petitioner

V.

HAROLD WHORTON
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

Terrence R. Fitzgerald
TERRENCE R. FITZGERALD
CHIEF APPELLATE DEFENDER OF THE
JEFFERSON DISTRICT PUBLIC DEFENDER
200 CIVIC PLAZA
701 WEST JEFFERSON STREET
LOUISVILLE, KENTUCKY 40202
(502) 587-3800
COUNSEL FOR PETITIONER

Daniel T. Goyette
DANIEL T. GOYETTE
DEPUTY DEFENDER
JEFFERSON DISTRICT PUBLIC DEFENDER
OF COUNSEL

CERTIFICATE OF SERVICE

I do hereby certify that a copy of this petition was served by depositing the same in a United States mail box, with first class postage prepaid to Hon. Patrick B. Kimberlin, III, Assistant Attorney General of Kentucky, Capitol Building, Frankfort, Kentucky 40601, Counsel for Respondent, on November 15, 1978.

Terrence R. Fitzgerald
TERRENCE R. FITZGERALD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-749

COMMONWEALTH OF KENTUCKY,
Petitioner

V.

HAROLD WHORTON,
Respondent

ON PETITION FOR WRIT OF
CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

WHETHER THE KENTUCKY SUPREME COURT PROPERLY DECLINED TO TREAT THE FAILURE OF THE TRIAL COURT TO GIVE A REQUESTED PRESUMPTION OF INNOCENCE INSTRUCTION IS HARMLESS ERROR.

REASONS FOR DENYING THE WRIT

In the Petition for Writ of Certiorari submitted by the Attorney General of Kentucky, it is argued that the Kentucky Supreme Court "misinterpreted and incorrectly" applied the holding of this court in Taylor v. Kentucky, 436 U.S.____, 98 S.Ct. 1930, ____ L.Ed.2d____(rendered May 30, 1978). Specifically, the petition states:

> [The Supreme Court of Kentucky] has interpreted "Taylor to mean that when an instruction on the presumption of innocence is asked for and denied there is reversible error." This interpretation requires automatic reversal in every such case regardless of the circumstances of the trial or the possible application of harmless error principles. We believe such an interpretation of Taylor v. Kentucky is wrong.

The attorney general now asks this court to exercise its extraordinary and discretionary jurisdiction on the premise that the failure to give a requested presumption of innocence instruction is subject to the harmless error rule. This argument was thoroughly examined by the Kentucky Supreme Court in a Petition for Rehearing and Modification which was subsequently denied on October 10, 1978. In addition, the court demonstrated its agreement with Taylor by amending the state procedural rules to require a presumption of innocence instruction in every criminal case whether requested or not. (Kentucky Rules of Criminal Procedure 9.56, effective July 1, 1978). Thus, it is evident that the decisions in Taylor and in the case at bar will not result in the wholesale reversal of criminal convictions, nor will the decisions cause confusion or disrupt the criminal justice process. Therefore, the instant case does not present a proper vehicle for the exercise of the discretionary powers of this court.

The thrust of the petitioner's argument is based on two interrelated premises: (1) Taylor is subject to the harmless error rule, and (2) Taylor is limited to the particular facts of that case. However, this position is clearly wrong. As the majority opinion of the Kentucky Supreme Court correctly noted,

nothing in Taylor supports the conclusion that the error can ever be harmless. Indeed, the majority and concurring opinions stress the special significance of the presumption of innocence and note that "its enforcement lies at the foundation of the administration of our criminal laws" and that it is a "basic component of a fair trial under our system of criminal justice."

A review of case law relating to harmless constitutional error establishes principles from which it may be readily seen that the failure to give a presumption of innocence instruction is not subject to the harmless error rule. In Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), at 87 S.Ct. 828, the court ratified earlier cases holding that some constitutional rights are "so basic to a fair trial that their infraction can never be treated as harmless error." In the footnote accompanying the text, the court noted the following errors, which are so fundamental as to preclude a finding of harmless error: Payne v. State of Arkansas, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958) (coerced confession); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9. L.Ed.2d 799 (1963) (right to counsel), [reaffirmed in Holloway v. Arkansas, ____U.S.____,98 S.Ct. 1173, ____L.Ed.2d____(1978)]; Tumey v. State of Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (impartial judge).

In Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969), the court held that a denial of the right to confront a nontestifying codefendant whose out-of-court statements were admitted into evidence was subject to the harmless error rule. However, the holding in Harrington appears to have been stripped of its vitality by the subsequent holding in Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). In Davis, defense counsel was not permitted on cross-examination to show that the prosecuting witness had a juvenile record which might have made him susceptible to prosecutorial influence. The court squarely held, at 94 S.Ct. 1111:

> Petitioner was thus denied the right of effective cross-examination which " would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it. Brookhart v. Janis, 384 U.S.1, 3, 86 S.Ct. 1245, 1246, 16 L.Ed.2d 314." Smith v. Illinois, 390 U.S. 129, 131, 88 S.Ct. 748, 750, 19 L.Ed.2d 956 (1968). (Emphasis added).

By this holding, the right of confrontation appears to have joined the other fundamental rights previously noted in Chapman.

The principle to be distilled from these cases is that any constitutional right which affects the integrity or fundamental fairness of the proceedings is exempt from the harmless error rule. Unquestionably, the presumption of innocence is such a fundamental right. As the court noted in Taylor at 98 S.Ct. 1935:

> While use of the particular phrase "presumption of innocence" - or any other form of words - may not be constitutionally mandated, the Due Process Clause of the Fourteenth Amendment must be held to safeguard "against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." Estelle v. Williams, 425 U.S., at 503, 96 S.Ct., at 1693 (emphasis added). The "purging" effect of an instruction on the presumption of innocence, Thaxton, 483 F.2d, at 1073, simply represents one means of protecting the accused's constitutional right to be judged solely on the basis of proof adduced at trial.

The Court has thus recognized that the purpose of this instruction is to safeguard a reasonable doubt standard and to insure that the accused receives a fair trial based solely on the evidence. Thus, the right to a presumption of innocence instruction is based on a concern for the integrity and fairness of the proceedings which renders the harmless error rule inapplicable.

In addition to the foregoing policy reasons for exempting certain errors from the harmless error rule, there is a simple practical reason for the exemptions. If a trial court commits mere evidentiary or procedural error, the record may be expected to contain sufficient information from which the impact of the error can be fairly assessed. By contrast, when an error of omission of the first constitutional magnitude has occurred, the record simply does not contain an adequate basis for determining the impact of the error. For example, in Holloway v. Arkansas, supra, the same attorney represented multiple defendants. The potential for a conflict of interest was held to render his assistance ineffective,

even though no actual ineffectiveness appeared on the record. Indeed, any other holding would have required the reviewing court to engage in speculations about the subjective mental state of the attorney. See also Gideon v. Wainwright, supra, in which the impossibility of determining the effect of the denial of counsel was noted.

The same practical impediment to the application of the harmless error rule in cases where the right to counsel has been denied also exists in the other classes of cases which have been exempted from the rule. In Davis v. Alaska, supra, the court appears to have recognized the impossibility of attempting to predict the impact on the jury which defective confrontation and cross-examination might have had. Similarly, in Payne v. Arkansas, supra, the court refused to speculate on the impact which a coerced confession might have had on the jury. Again, in Tumey v. Ohio, supra, the court adopted a prophylactic rule in order to avoid inquiring into the subjective mental state of a judge with a financial interest in the litigation.

It is obvious that the same impediment tothe application of the harmless error rule exists whenever a presumption of innocence instruction is denied. In order to assess the potential impact of the required instruction, a reviewing court would have to engage in considerable speculation about the attitudes of the jurors toward the presumption of innocence. Moreover, the reviewing court would have to speculate about the thought processes of the jurors and their discussion during the course of the deliberation. Such speculation vitiates the very reasonable doubt standard which gives rise to the presumption of innocence. For this reason, the failure to give an instruction on the presumption of innocence cannot be made subject to the harmless error rule.

Moreover, it is important to note that the harmless error argument advanced by the petitioner was first made in the petition for Rehearing and Modification in the state court. The petitioner's initial brief on appeal omitted any discussion of the harmless error issue, even though the brief submitted by Whorton clearly addressed this very point. Thus, the petitioner now seeks to have this court adopt a position which was not sought in the state courts at the first opportunity, and which should clearly have been anticipated and responded to at the earliest stage of the proceedings.

The purpose of requiring a presumption of innocence instruction is to "impress upon the jury the importance of the right to have the guilt or innocence of every criminal defendant determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." If this Court limits Taylor before the holding can have any repercussions in other criminal cases, many state courts will no doubt choose to play "constitutional roulette" by excusing the absence of a Taylor instruction frequently instead of enforcing the spirit of Taylor uniformly. As a consequence, the federal courts will be inundated with requests for constitutional review on a case by case basis before the salutary effect of a Taylor instruction can be determined from experience. Justice and judicial economy favor a period of implementation before a rational decision on limitation can be made.

In declining to apply the harmless error rule, the state court below stated:

> We know very well that in actuality Taylor was no more "prejudiced" in his case than Whorton was in this one. Yet Taylor contains no hint that it might have been appropriate to consider whether the error was in fact prejudicial.

Thus, the state court has found that a degree of "prejudice" comparable to that which required a new trial in Taylor is also present in case at bar. The state court merely disagreed with this Court's assessment that prejudice was present in Taylor. Therefore, it would be unwise to limit Taylor and give the state court below free rein to make its own assessment of prejudice on a case by case basis.

CONCLUSION

The issue presented by Petitioner alleging misinterpretation and misapplication of Taylor v. Kentucky is without merit for the reasons stated herein. Accordingly, the petitioner's application for a writ of certiorari should be denied.

RESPECTFULLY SUBMITTED,

TERRENCE R. FITZGERALD
CHIEF APPELLATE DEFENDER OF THE
JEFFERSON DISTRICT PUBLIC DEFENDER
200 CIVIC PLAZA
701 WEST JEFFERSON STREET
LOUISVILLE, KENTUCKY 40202
(502) 587-3800
COUNSEL FOR PETITIONER

DANIEL T. GOYETTE
DEPUTY DEFENDER
JEFFERSON DISTRICT PUBLIC DEFENDER
OF COUNSEL

Supreme Court, U. S.
FILED
FEB 17 1979
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-749

COMMONWEALTH OF KENTUCKY - Petitioner

versus

HAROLD WHORTON - - - - Respondent

On Petition for a Writ of Certiorari to the
Supreme Court of Kentucky

BRIEF FOR PETITIONER

ROBERT F. STEPHENS
Attorney General

PATRICK B. KIMBERLIN, III
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Counsel for Petitioner

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

TABLE OF CONTENTS

PAGE

Opinion Below 1

Jurisdiction 1

Question Presented 2

Constitutional Provisions Involved 2

Statement of the Case 2– 4

Argument 5–17

The Supreme Court of Kentucky Misinterpreted and Misapplied to the Instant Case the Prior Decision of This Court in *Taylor* v. *Kentucky*, 436 U. S. 478 (1978) 5–10

Comparison of the Whorton and Taylor Cases 10–17

A. Evidence 11

B. Reading Indictment to Jury 12

C. Prosecutor's Summation 12

D. Reasonable Doubt Instruction 13–14

E. Cumulative Effect 15–17

Conclusion 17–18

Proof of Service 19

TABLE OF CASES AND AUTHORITIES

Cases:

PAGE

Chapman v. *California*, 386 U. S. 18 (1967) 16, 18
Dunbar v. *United States*, 156 U. S. 185 (1895) 14
Harrington v. *California*, 395 U. S. 250 (1969) 16, 18
Holland v. *United States*, 348 U. S. 121 (1954) 14
Miles v. *United States*, 103 U. S. 304 (1880) 13
Taylor v. *Kentucky*, 436 U. S. 478 (1978) ..5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17
Whorton v. *Commonwealth*, Ky., 570 S. W. 2d 627 (1978) 1, 5, 6, 7, 8, 9, 14

Constitutional Provisions:

Fourteenth Amendment, United States Constitution 2, 10, 17

Miscellaneous:

Kentucky Revised Statute 508.060 2
Kentucky Revised Statute 515.020 2
Kentucky Rule of Criminal Procedure 9.56 8
28 USC § 1257(3) 1

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-749

COMMONWEALTH OF KENTUCKY - - *Petitioner*

v.

HAROLD WHORTON - - - - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR PETITIONER

OPINION BELOW

The Opinion of the Supreme Court of Kentucky is reported as *Whorton* v. *Commonwealth*, Ky., 570 S. W. 2d 627 (1978). (The Opinion appears in the Appendix to the Petition for Writ of Certiorari at pp. 13-38.)

JURISDICTION

The Opinion of the Supreme Court of Kentucky in File No. 78-SC-92-MR was rendered on July 25, 1978. On October 10, 1978 that court denied Petitioner's timely Petition for Rehearing and Reconsideration and issued its Mandate in this case. (Appendix, hereinafter A., p. 6). The Petition for Writ of Certiorari was granted on January 8, 1979. The jurisdiction of this Court is invoked on the basis of 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether the Supreme Court of Kentucky misinterpreted and misapplied to the instant case the prior decision of this Court in *Taylor* v. *Kentucky*, 436 U. S. 478 (1978)?

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The respondent, Harold Whorton, was convicted in the Jefferson Circuit Court, Criminal Division, Jefferson County, Kentucky, on ten counts of first degree robbery, two counts of first degree wanton endangerment and two counts of first degree attempted robbery, as proscribed by KRS 515.020 and 508.060. (Transcript of Evidence, hereinafter TE, 200-202). Judgment was entered in accordance with the jury's verdicts and Whorton was sentenced to consecutive terms of imprisonment aggregating 230 years of imprisonment. However, the Kentucky Supreme Court reversed the robbery and attempted robbery convictions because the

trial court refused to instruct the jury on presumption of innocence.[1]

The charges against Whorton grew out of three separate incidents. During the early morning hours of May 15, 1976, a black male entered a Krispy Kreme Donut Shop in or near Shively in Jefferson County, Kentucky carrying a pistol in one hand and a knife in the other. (TE, 86-90). After robbing the store and its employes, he cut the telephone lines, and left in a blue 1967 Oldsmobile. (TE, 87, 99). Four of those employes subsequently identified Harold Whorton as the robber. (TE, 89, 96, 100, 103).

On the evening of May 23, 1976, a black male, carrying a gun in one hand and a knife in the other, entered and robbed a Burger Chef restaurant located on Shelbyville Road in Jefferson County, Kentucky. (TE, 105-108). After cutting the telephone lines, he fled. (TE, 111). Two of the employes of that restaurant, who were present during the robbery, subsequently identified Harold Whorton as the robber. (TE, 107, 112).

On June 1, 1976, near midnight, a man entered a Jerry's restaurant on Brownsboro Road in Jefferson County, Kentucky and, after ordering some food, stuck a gun in the face of a waitress and announced that "this is a robbery." He then asked for the manager. (TE, 18). When the manager came to the front of the restaurant the robber fired a shot into the ceiling (TE, 54, 62) and then herded him, his employes and cus-

[1]The wanton endangerment convictions were reversed on appeal pursuant to a separate state ground. However, the sole basis for the reversal of Whorton's other state convictions in this case was the failure of the trial court to instruct the jury, upon request, on the presumption of innocence.

tomers together, taking money from their wallets, and forcing the manager to give him $700 from the safe. (TE, 43-47). After pulling the telephone out of the wall the robber then left this assembled group in a back room of the restaurant and made his escape. (TE, 44).

However, during the course of this robbery, one of the customers had managed to sneak away unnoticed and called the police from another restaurant located across the street. (TE, 69). Shortly thereafter, a police officer gave chase to an automobile departing the vicinity of the restaurant and pursued it until it struck a fire hydrant. (TE, 122-124). Harold Whorton emerged from that automobile and pointed a pistol at the officer who had given chase but dropped the weapon when commanded to do so. (TE, 124, 139). The stolen money and two pistols were found in the automobile, a 1967 blue Oldsmobile. (TE, 152, 131-137). Whorton and a companion were taken at once to Jerry's restaurant where ten of the persons present during the robbery identified Whorton as the robber. (TE, 20-21, 35, 36, 45, 54, 59, 63, 71, 78).

Whorton did not testify at his trial. The only evidence in his defense was given by his wife and her sister, who offered alibi testimony with regard to his whereabouts during the night of May 15, 1976, when the donut shop robbery occurred. During the trial Whorton requested an instruction on presumption of innocence but the trial court declined to so instruct the jury.[2]

[2]The requested instruction on the presumption of innocence reads as follows:

(Footnote continued on following page)

ARGUMENT

The Supreme Court of Kentucky Misinterpreted and Misapplied to the Instant Case the Prior Decision of This Court in *Taylor* v. *Kentucky*, 436 U. S. 478 (1978).

The Supreme Court of Kentucky has misinterpreted and misapplied a prior decision of this court, *Taylor* v. *Kentucky,* 436 U. S. 478 (1978), to the instant case. That court has interpreted *Taylor* v. *Kentucky* "to mean that when an instruction on the presumption of innocence is asked for and denied there is a reversible error." 570 S. W. 2d, at 633. This interpretation requires automatic reversal in every such case regardless of the circumstances of the case or the evidence adduced at trial. The petitioner respectfully submits that such an interpretation of *Taylor* v. *Kentucky* is incorrect.

In *Taylor* v. *Kentucky,* 436 U. S. 478 (1978), this Court held that *under the facts of that case* a Kentucky conviction had to be reversed when a presumption of innocence instruction tendered by the defense was refused by the trial court. On June 7, 1978, a week after the *Taylor* decision was rendered by this Court, the instant case came before the Supreme Court

(Footnote continued from preceding page)

"The law presumes an accused to be innocent of crime. He begins the trial with a clean slate, with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be ensidered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit an accused unless the jury members are satisfied beyond a reasonable doubt of the accused's guilt from all the evidence in the case," 570 S. W. 2d at 630. (A., p. 9).

of Kentucky for oral argument.[3] One of the issues in this case was whether the trial court erred in refusing to grant a requested instruction on presumption of innocence. On July 25, 1978, the Supreme Court of Kentucky rendered its Opinion in the instant case[4] and, with respect to the issue on a presumption of innocence instruction, stated as follows:

> "In *Taylor* a judgment of the Franklin Circuit Court was reversed because the trial court declined to instruct the jury that the law presumes a defendant innocent—and this despite the fact that on *voir dire* the jurors had already signified that they understood that proposition! If the trial court's 'truncated discussion of reasonable doubt . . . was hardly a model of clarity,' as remarked in *Taylor,* we must confess that we have a similar difficulty with the *Taylor* opinion itself.
>
> The dissenting members of our court feel that the holding in Taylor is confined to the facts of

[3]After the decision of this Court in *Taylor* v. *Kentucky,* but before the issuance of the opinion in the instant case by the Supreme Court of Kentucky, the Kentucky Court of Appeals—an intermediate state appellate court—*affirmed convictions* in two cases involving requested instructions on presumption of innocence wherein *Taylor* was distinguished on its facts. *Gully* v. *Commonwealth,* File No. CA-2048-MR and *Stewart* v. *Commonwealth,* File No. CA-1963-MR. These cases were not to be published and are not cited here as authority, but to apprise this Court chronologically of the impact of *Taylor* in the Commonwealth of Kentucky. Both cases, on motions for discretionary review, were reversed by the Supreme Court of Kentucky in light of *Whorton* v. *Commonwealth, supra. Gully* v. *Commonwealth,* File No. 78-SC-542-D (January 16, 1979) and *Stewart* v. *Commonwealth,* File No. 78-SC-429-D (November 21, 1978).

[4]The Supreme Court of Kentucky also reversed on the same day as the *Whorton* decision the cases of *Williams* v. *Commonwealth,* File No. 78-SC-68-MR and *Avery* v. *Commonwealth,* File No. 78-SC-75-MR by Memorandum Opinions. Both cases are now pending before this Court on Petition for Writ of Certiorari filed by Petitioner.

> the case. They draw that inference from the next-to-last sentence of the opinion (emphasis added): 'We hold that *on the facts of this case** the trial court's refusal to give petitioner's requested instruction in the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment.' Admittedly, the weight of the evidence against Whorton was far greater than it was against the defendant in *Taylor.* But does the Supreme Court actually mean to suggest that a defendant's right to the instruction can be made, ultimately, to stand or fall on the weight of the evidence in a given case? If so, then every case in which the trial court refused to give it will have to be decided according to the Chapman-Harrington harmless-error test. If that was the intention, it would have been considerate of the court to say so. It may be that the question of harmless error was not argued in that case, but 'a model of clarity' would have left a clean cut rather than a jagged stump. After all, it might reasonably have been foreseen that this court would have to apply the decision to a goodly number of other cases then in the process of appeal in this state, Whorton's being but one of them.
>
> Those of us in the majority would like to be able to hold that this newly-declared constitutional requirement is subject to the harmless-error rule, but we are afraid it might not stick. We know very well that in actuality Taylor was no more 'prejudiced' in his case than Whorton was in this one. Yet *Taylor* contains no hint that it might

*Footnote 4 from the *Whorton* Opinion reads as follows: "4 On what other facts an appellate court might rest its decision we hesitate to guess."

have been appropriate to consider whether the error was in fact prejudicial. To bring this discussion to a merciful end, we read *Taylor* to mean that when an instruction on the presumption of innocence is asked for and denied there is a reversible error. If it means something short of that, we shall welcome further enlightenment from the only source that seems to be able either to construe or to amend the Constitution.

The judgment is reversed with directions for a new trial." 570 S. W. 2d, at 632-633.

The aforequoted holding in the opinion constituted an unexpected and surprise interpretation of *Taylor* v. *Kentucky* by the Supreme Court of Kentucky which the petitioner considers to be incorrect. Moreover, this misinterpretation of *Taylor* v. *Kentucky* poses a serious hindrance to the effective administration of criminal justice in Kentucky and will require the automatic reversal of numerous state criminal convictions. This is true even though the Supreme Court of Kentucky, apparently in response to the *Taylor* v. *Kentucky* decision, amended Kentucky Rule of Criminal Procedure 9.56, effective July 1, 1978, which now requires the trial court to give a presumption of innocence instruction in every criminal case.[5] However, the petitioner

[5]That Rule reads as follows:

"(1) In every case the jury shall be instructed substantially as follows: 'The law presumes a defendant to be innocent of a crime, and the indictment [or other accusatory document] shall not be considered as evidence or as having any weight against him. You shall find the defendant not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him

(Footnote continued on following page)

has estimated that between 35 to 80 criminal cases tried prior to the rule change will be automatically reversed due to that court's interpretation of *Taylor* v. *Kentucky* in *Whorton* v. *Commonwealth*.[6]

It is the position of the petitioner that *Taylor* v. *Kentucky* does not mean that a state criminal conviction in Kentucky must be automatically reversed merely because a requested instruction on presumption of innocence is refused by the trial court. It is our belief that *Taylor* v. *Kentucky* does not create a rule of law requiring such an instruction as a *sine qua non* in Kentucky criminal cases. In fact, it appears to the petitioner that under *Taylor* v. *Kentucky* the federal constitutional impact of such an instruction would depend wholly upon the facts and circumstances of each case and it would be only in those cases having exceptional circumstances, such as in *Taylor* v. *Kentucky*, that the absence of such instruction would result in a violation of an accused's right to due process under the Fourteenth Amendment to the United States Constitution.

(Footnote continued from preceding page)

not guilty [and if you find him not guilty but have a reasonable doubt as to the degree of the offense of which he is guilty, you shall find him guilty of the lower degree.]'

"(2) The instructions should not attempt to define the term 'reasonable doubt'."

[6]Such automatic reversal under *Whorton* has been applied to *Miller* v. *Kentucky*, No. 77-6912, wherein this Court granted an accused's Petition for Writ of Certiorari on October 2, 1978, and reversed and vacated the judgment of the Supreme Court of Kentucky, ordering that case to be reconsidered in light of *Taylor* v. *Kentucky*. The Supreme Court of Kentucky has subsequently reversed that case pursuant to its holding in the case at bar, *Miller* v. *Commonwealth*, File No. 78-SC-410-MR, rendered January 3, 1979).

Accordingly, the petitioner maintains that this Court's Opinion in *Taylor* v. *Kentucky* is limited solely to its facts. As previously noted, perusal of the Opinion clearly indicates that it was the unusual and unique "extraneous considerations" in that case which gave rise to the violation of Taylor's right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment.[7] Thus, *Taylor* v. *Kentucky* does not create an across-the-board constitutional principle of sweeping applicability, but would apply only to those rare cases with factual situations involving such "extraneous considerations" as were found therein. Therefore, the Supreme Court of Kentucky was incorrect in interpreting *Taylor* v. *Kentucky* to apply to the case at bar merely because a requested instruction on presumption of innocence was rejected by the trial court, without analyzing the facts and circumstances of the two cases. The facts and circumstances of the instant case are clearly distinguishable from those in *Taylor*.

COMPARISON OF THE *WHORTON* AND *TAYLOR* CASES

The petitioner now directs this Court's attention to a comparison of the "facts and circumstances" in *Taylor* v. *Kentucky* and the case at bar:

---

[7]*Taylor* v. *Kentucky*, 436 U. S., at 487, Footnote 15, ". . . the *cumulative effect of the potentially damaging circumstances* of this case violated the Due Process guarantee of fundamental fairness in the absence of an instruction as to the presumption of innocence. . . ." (Emphasis ours.)

A.

Evidence

In *Taylor* v. *Kentucky* the evidence presented at trial consisted only of the conflicting testimony of the victim and the accused, in what was described by this Court as a "swearing contest". Here, on the other hand, the evidence adduced at trial established that Whorton had committed three different crimes within a seventeen day period that were very similar to one another in their *modus operandi*. Moreover, in each of the three crimes the prosecution presented numerous eyewitnesses who positively identified Whorton as the perpetrator. For example, *two eyewitnesses* identified Whorton as the robber in the Burger Chef restaurant robbery; *four eyewitnesses* positively identified Whorton in the Krispy Kreme Donut Shop robbery; and, *ten prosecution witnesses* identified Whorton as the robber of the Jerry's restaurant. Whorton was pursued by the police while attempting to make his get away from the last robbery and was apprehended only after he crashed his automobile into a fire hydrant. Weapons, the stolen money, and other incriminating evidence were found in his automobile. The only evidence presented by Whorton in his behalf was that of his wife and sister-in-law who testified that on the evening of the Krisy Kreme Donut Shop robbery, May 15, 1976, he was visiting his sister-in-law. Thus, the evidence in the instant case, unlike that in *Taylor* v. *Kentucky*, cannot be described as a mere "swearing match".

B.

Reading Indictment to Jury

As in *Taylor* v. *Kentucky,* the prosecutor read the three indictments to the jury. (Transcript of Record, hereinafter TR, 4-10). However, unlike *Taylor* v. *Kentucky,* after having read the indictments the prosecutor made no comments such as would permit the jury to draw inferences of guilt from the mere fact that Whorton had been indicted. Compare *Taylor* v. *Kentucky,* 436 U. S., at 487.

C.

Prosecutor's Summation

Another "extraneous consideration" (perhaps a critical one) which this Court duly noted in *Taylor* v. *Kentucky* were the numerous comments made by the prosecutor in his summation which this Court construed as asking the jury to draw inferences of the accused's conduct *from facts not in evidence.* The thrust of these comments, to a large degree, were construed as an invitation to the jury to consider Taylor's *status* as a defendant as evidence, in itself, tending to prove his guilt. On the other hand, in the instant case the summation of the prosecutor (TE, 186-199) contains no comments at all similar to those found in *Taylor* v. *Kentucky,* 436 U. S., at 487.

D.

Reasonable Doubt Instruction

In the case at bar the trial court gave an instruction to the jury defining reasonable doubt.[8] This instruction is very similar to that given by the trial court in *Taylor* v. *Kentucky,* 436 U. S., at 481, footnote 7. It is the position of the petitioner that the reasonable doubt instruction does not constitute an "extraneous consideration" adversely effecting the respondent in the case at bar, given all the facts and circumstances of this case. In general, the instructions in *Taylor* v. *Kentucky* have been described by this Court as *skeletal* and *Spartan.* Specifically, the reasonable doubt instruction in *Taylor* was characterized by this Court as "hardly a model of clarity", 436 U. S., at 488. However, the petitioner would respectfully point out that in *Miles* v. *United States,* 103 U. S. 304, 312 (1880), this Court observed that "attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury."[9] Also see

[8] "Instruction No. XVIII—If upon the whole case you have a reasonable doubt as to the defendant's guilt, you shall find him not guilty. The term reasonable doubt as used in these instructions means a substantial doubt, a real doubt, in that you must ask yourself not whether a better case might have been proven but whether, after hearing all the evidence, you actually doubt that the defendant is guilty." (App., p. 30).

[9] Respondent's tendered instruction on reasonable doubt reads as follows:

> "A reasonable doubt is a fair doubt based upon reason and common sense and arising from the state of the evidence. It is rarely possible to prove anything to an absolute certainty. The meaning of the rule is that the proof must be such as to exclude, not every hypothesis or possibility of innocence, but any

(Footnote continued on following page)

Dunbar v. *United States,* 156 U. S. 185, 199 (1895) and *Holland* v. *United States,* 348 U. S. 121, 140 (1954). To our knowledge this Court has never held that there is a constitutional requirement that the term "reasonable doubt" be defined *at all,* much less, in a particular manner.[10] Thus, the petitioner respectfully submits that the reasonable doubt instruction given to the jury here does not constitute an "extraneous consideration" merely because of its brevity.

(Footnote continued from preceding page)

fair and rational hypothesis except that of guilt; what is required is not an absolute or mathematical certainty but a moral certainty. An accused is not to be convicted on mere suspicion or conjecture. A reasonable doubt may arise, not only from the evidence produced, but also from a lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, an accused has the right to rely upon failure of the prosecution to establish such proof. (An accused may also rely upon evidence brought out on cross-examination of witnesses for the prosecution.) The law does not impose upon an accused the duty of producing any evidence. A reasonable doubt exists in any case when, after careful and impartial consideration of all the evidence, the jury members do not feel convinced to a moral certainty that an accused is guilty of the offense(s) charged." 570 S. W. 2d, at 629-630. (A., pp. 9-10).

[10]Some states, including Kentucky as of July 1, 1978, forbid defining the term "reasonable doubt" in order to avoid long elaborate confusing definitions which if anything, tend to mislead the jury. *State* v. *Van,* Mo., 543 S. W. 2d 827 (1976); *Miller* v. *State,* Okla. Cr., 567 P. 2d 105, 109 (1977); *State* v. *Starr,* W. Va., 216 S. E. 2d 242 (1975); *Blakeley* v. *State,* Wyo., 542 P. 2d 857 (1975); *Gray* v. *State,* Miss., 351 So. 2d 1342 (1977); *Foster* v. *State,* Ga., 242 So. 2d 600 (1978); *State* v. *Canedo,* Ariz., 563 P. 2d 315 (1977).

E.

Cumulative Effect

In discussing the necessity of a presumption of innocence instruction, this Court stated:

> ". . . that one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial. [Citations omitted]. And it long has been recognized that an instruction on the presumption is one way of impressing upon the jury the importance of that right. [Citations omitted]. While use of the particular phrase 'presumption of innocence'—or any other form of words— may not be constitutionally mandated, the Due Process Clause of the Fourteenth Amendment must be held to safeguard 'against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.' [Citation omitted]. The 'purging' effect of an instruction on the presumption of innocence, *Thaxton,* supra at 1073, simply represents one means of protecting the accused's constitutional right to be judged solely on the basis of proof adduced at trial." 436 U. S., at 485-486.

Upon considering the numerous negative extraneous circumstances which occurred during Taylor's trial, this Court concluded that the *cumulative effect* of those potentially damaging circumstances violated the due process guarantee of fundamental fairness in

the absence of an instruction on presumption of innocence because there was a genuine danger that the jury would convict Taylor on the basis of these extraneous considerations. *Taylor* v. *Kentucky,* 436 U. S. 490, and 487 at footnote 15.

Significantly, Taylor maintained that, given the circumstances of his case, the purging effect of an instruction on the presumption of innocence was essential to a fair trial. This Court agreed. On the other hand, in the case *sub judice* there is no collection of negative extraneous circumstances necessitating the purging effect of an instruction on the presumption of innocence. Here, perusal of the record will unequivocally establish that the respondent's right to a fair trial was not jeopardized.

Alternatively, if the decision in *Taylor* v. *Kentucky* created a constitutionally mandated requirement that an instruction on presumption of innocence, when requested, must be granted, then the petitioner respectfully submits that, in light of the facts in this case, as distinguished from those in *Taylor* v. *Kentucky,* the Supreme Court of Kentucky should have applied the Harmless-Error rule to this case. *Harrington* v. *California,* 395 U. S. 250 (1969); *Chapman* v. *California,* 386 U. S. 18 (1967).

We are of course cognizant of the minority view in the *Chapman* case that any departure from constitutional procedures should result in automatic reversal regardless of the weight of the evidence. 386 U. S., at 42-45. However, in *Chapman* it was the majority view

of this Court that where the record indicates overwhelming evidence of guilt and where the alleged constitutional error does not so taint the trial in light of that record of evidence, the constitutional error must be considered harmless in nature. Such is the case at bar, assuming that the mere refusal to grant a requested instruction on presumption of innocence creates a violation of constitutional rights under the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons the petitioner respectfully requests this Honorable Court to reverse and remand this case to the Supreme Court of Kentucky because that court incorrectly interpreted *Taylor* v. *Kentucky,* 436 U. S. 478 (1978) to require automatic reversal of respondent's conviction on the basis of the trial court's refusal to instruct the jury, at respondent's request, on the presumption of innocence. The petitioner also requests that this Court hold that *Taylor* v. *Kentucky* is limited to its own facts and does not stand for the principle that the concept of presumption of innocence must be instructed upon when requested.

Alternatively, if *Taylor* v. *Kentucky* does establish a constitutional principle mandating that the jury be instructed upon the presumption of innocence the petitioner urges this Court to hold that the Supreme Court of Kentucky erred in not considering the application of the Harmless-Error Rule as enunciated in

Chapman v. *California,* 386 U. S. 18 (1967) and *Harrington* v. *California,* 395 U. S. 250 (1969), to this case.

Respectfully submitted,

ROBERT F. STEPHENS
Attorney General
Patrick B. Kimberlin, III
PATRICK B. KIMBERLIN, III
Assistant Attorney General
Capitol Building, Room 122
Frankfort, Kentucky 40601
Counsel for Petitioner

PROOF OF SERVICE

I, Patrick B. Kimberlin, III, counsel for the petitioner, hereby certify that three (3) copies of the foregoing Brief for Petitioner were mailed, postage prepaid, this 16th day of February, 1979, to Hon. Terrence F. Fitzgerald, Chief Appellate Defender, Jefferson District Public Defender, 200 Civic Plaza, 701 West Jefferson, Louisville, Kentucky 40202, Counsel for Respondent.

Patrick B. Kimberlin, III

PATRICK B. KIMBERLIN, III
Assistant Attorney General

FOR ARGUMENT

Supreme Court, U. S.
FILED
MAR 21 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-749

COMMONWEALTH OF KENTUCKY,

Petitioner,

v.

HAROLD WHORTON,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT

PAUL G. TOBIN
Jefferson District Public Defender
of Counsel

TERRENCE R. FITZGERALD
Chief Appellate Defender of the
Jefferson District Public Defender
200 Civic Plaza
701 West Jefferson Street
Louisville, Kentucky 40202
(502) 587-3800
Counsel for Respondent

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO • (202) 393-0625

INDEX

	Page
JURISDICTION	1
CONSTITUTIONAL PROVISIONS	2
QUESTION PRESENTED	3
SUPPLEMENTAL STATEMENT OF THE CASE	3
ARGUMENT	
THE SUPREME COURT OF KENTUCKY CORRECTLY INTERPRETED AND APPLIED THE PRIOR DECISION OF THIS COURT IN *TAYLOR V. KENTUCKY.*	6
A. STATE PROCEEDINGS	7
B. MOOTNESS AND LACK OF JURISDICTION	8
C. THE STATE COURT CORRECTLY APPLIED *TAYLOR*	12
D. THE HARMLESS ERROR RULE IS INAPPLICABLE	14
E. THE ERROR WAS NOT HARMLESS	23
CONCLUSION	25

TABLE OF AUTHORITIES

Cases: *Page*

Aetna Life Insurance Co. v. Haworth,
300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617
(1937) 8,9

Aikens v. California,
406 U.S. 813, 92 S.Ct. 1931, 32 L.Ed.2d 511
(1972) 10

Alton R. Co. v. Illinois Commerce Com.,
305 U.S. 548, 59 S.Ct. 340, 83 L.Ed. 344
(1939) 11

Ashcraft v. State of Tennessee,
322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192
(1943) 9

Black v. Cutter Laboratories,
351 U.S. 292, 76 S.Ct. 824, 100 L.Ed.2d 1188
(1956) 10

Braley v. Gladden,
403 F.2d 858 (9th Cir. 1968) 20

Brookhart v. Janis,
384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314
(1966) 15

Chapman v. California,
386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705
(1967) 6,11,12,14,15,22

Clarke v. Clarke,
178 U.S. 186, 20 S.Ct. 873, 44 L.Ed. 1028
(1900) 11

Coffin v. United States,
156 U.S. 432, 15 S.Ct. 394, 39 L.Ed. 481
(1895) 13,15,17

Commonwealth v. Boyd,
326 N.E.2d 320 (Mass. 1975) 18

Commonwealth v. Davis,
Pa., 351 A.2d 642 (1976) 21

Commonwealth v. Jones,
Pa.Super., 327 A.2d 638 (1974) 18

Commonwealth v. Mayhugh,
233 Pa.Super. 24, 336 A.2d 379 (1975) 21

Cramp v. Board of Public Instruction,
368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285
(1961) 9

Davis v. Alaska,
415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347
(1974) 14,15,19

Ealey v. State,
Ga.App., 232 S.E.2d 620 (1977) 22

Enterprise Irr. Dist. v. Farmers' Mut. Canal Co.,
243 U.S. 157, 37 S.Ct. 318, 61 L.Ed. 644 (1917) ... 11

Estelle v. Williams,
425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126
(1976) 12,17

Eustis v. Bolles,
150 U.S. 361, 14 S.Ct. 131, 37 L.Ed. 1111
(1893) 11

Flast v. Cohen,
392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947
(1968) 9

Fox Film Corp. v. Muller,
296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158
(1935) 9,11

Fox River Paper Co. v. Railroad Commission of Wis., 274 U.S. 651, 47 S.Ct. 669, 71 L.Ed.
1279 (1927) 11

Gideon v. Wainwright,
372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799
(1963) 14,19

Gilligan v. Morgan
413 U.S. 1, 93 S.Ct. 2440, 37 L.Ed.2d 407
(1973) 9

Halquist v. State,
Tex., 489 S.W.2d 88 (1972) 21

Harrington v. California,
395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284
(1969) 6,11,12,14,22

Herb v. Pitcairn,
324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789
(1945) 10

Hill v. State,
Fla.App., 209 So.2d 689 (1968) 21

Holland v. United States,
209 F.2d 516 (10th Cir. 1954) 18

Holloway v. Arkansas,
___ U.S. ___, 98 S.Ct. 1173, ___ L.Ed.2d ___
(1978) 14,19

Holmes v. Jennison,
39 U.S. 540, 14 Pet. 540, 10 L.Ed. 579
(1840) 11

In re Winship,
397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368
(1970) 17

Klinger v. State of Missouri,
80 U.S. 257, 13 Wall. 257, 20 L.Ed. 635
(1872) 9

Liner v. Jafco, Inc.,
375 U.S. 301, 84 S.Ct. 391, 11 L.Ed.2d 347
(1964) 8

McDonald v. United States,
284 F.2d 232 (D.C. Cir. 1960) 21

Patterson v. Alabama,
294 U.S. 600, 55 S.Ct. 575, 79 L.Ed. 1082
(1935) 9

Payne v. State of Arkansas,
356 U.S. 560, 78 S.Ct. 844, 2 L.Ed. 975 (1958) . 14,19

People v. Donald,
21 Ill.App.3d 696, 315 N.E.2d 904 (1974) 22

People v. Hill,
Colo., 512 P.2d 257 (1973) 20,22

People v. Kanan,
Colo., 526 P.2d 1339 (1974) 21

People v. Vann,
115 Cal.Rptr. 352, 524 P.2d 324 (1974) 22

People v. Weinstein,
Ill., 220 N.E.2d 432 (1966) 21

Poe v. Ullman,
367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989
(1961) 8

Reynolds v. United States,
238 F.2d 460 (9th Cir. 1956) 15

Smith v. Illinois,
390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956
(1968) 15

State v. Cokeley,
W.Va., 226 S.E.2d 40 (1976) 22

State v. Henderson,
N.M.App., 466 P.2d 116 (1970) 22

State v. McHenry,
Wash., 558 P.2d 188 (1977) 22

State v. Rosen,
Mich.App., 171 N.W.2d 488 (1969) 21

State v. Tolley,
226 S.E.2d 353 (N.C. 1976) 18

Taylor v. Kentucky,
436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468
(1978) 6,11,12,13,17,20,22

Tumey v. State of Ohio,
273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749
(1927) 14,19

United States ex rel. Campagne v. Follette,
306 F.Supp. 1255 *affirmed,* 419 F.2d 833
(D.C.N.Y. 1969), *cert. denied* sub nom.
Campagne v. Follette, 400 U.S. 834, 91
S.Ct. 69, 27 L.Ed.2d 66 (1970) 21

United States ex rel. Castleberry v. Sielaff,
446 F.Supp 451 (D.C.Ill. 1978) 18

United States v. Fernandez,
496 F.2d 1294 (5th Cir. 1974) 21

United States v. Lawson,
507 F.2d 433 (7th Cir. 1974) 18

United States v. Pepe,
501 F.2d 1142 (10th Cir. 1974) 21

United States v. Press,
336 F.2d 1003 (2d Cir. 1964) 17

United States v. Thaxton,
483 F.2d 1071 (5th Cir. 1973) 15

Watson v. Commonwealth,
File No. 78-SC-300-MR (rendered
February 27, 1979) 1,7,8,11,23

Whaley v. Commonwealth,
Va., 200 S.E.2d 556 (1973) 22

Williams v. Kaiser,
323 U.S. 471, 65 S.Ct. 363, 89 L.Ed. 398
(1945) 10

Williams v. State,
Ark., 535 S.W.2d 842 (1976) 21

Wilson v. Loew's, Inc.,
355 U.S. 597, 78 S.Ct. 526, 2 L.Ed.2d 519
(1958) 10,11

Zacchini v. Scripps-Howard Broadcasting Co.,
433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965
(1977) 10

Constitutional Provisions:

Article III, Section II 2,3

Fourteenth Amendment, Section I 3

Miscellaneous:

1 Greenleaf, *Evidence* §34 (7th ed. 1854) 16

Kentucky Rule of Criminal Procedure 9.56 7,23

McCormick, "Charges on Presumptions and
Burden of Proof," 5 North Carolina L.
Review 291 (1927) 16

28 USC §1257 (3) 1

"Criminal Procedure—Presumption of Innocence,"
24 Vanderbilt L.Rev. 412 (March 1971) 16

J. Wigmore, *Evidence* (3d ed. 1940) 18

Wright, §12 *Law of Federal Courts*, 2d ed (1970) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-749

COMMONWEALTH OF KENTUCKY,

Petitioner,

v.

HAROLD WHORTON,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT

JURISDICTION

On July 25, 1978, the Kentucky Supreme Court rendered an opinion reversing the conviction of the respondent. On October 10, 1978, a timely petition for rehearing and modification was denied. On January 8, 1979, the Petition for Writ of Certiorari was granted. Jurisdiction was invoked pursuant to 28 U.S.C. § 1257(3).

On February 27, 1979, the Supreme Court of Kentucky rendered an unanimous opinion in *Watson v. Commonwealth of Kentucky*, File No. 78-SC-300-MR, which held unequivocally that the *Whorton*

ruling was a matter of state law. The Kentucky Supreme Court determined that the court would not "engage in the mental gymnastics inherent in the application of the harmless error doctrine." On the basis of this decision, the respondent subsequently filed a memorandum with this Court suggesting that, in light of the decision in *Watson*, the case at bar should be dismissed for lack of jurisdiction or mootness. This Court passed this issue to the merits of the case.

CONSTITUTIONAL PROVISIONS

ARTICLE III

Section II

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exception and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crime shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

FOURTEENTH AMENDMENT

Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTIONS PRESENTED

WHETHER THE SUPREME COURT OF KENTUCKY MISINTERPRETED AND MISAPPLIED THE PRIOR DECISION OF THIS COURT IN *TAYLOR V. KENTUCKY*?

SUPPLEMENTAL STATEMENT OF THE CASE

Harold Whorton was charged in three separate indictments with the commission of armed robberies which occurred at Krispy Kreme Doughnut Shop,

Burger Chef and Jerry's Restaurant, and with two counts of wanton endangerment [Transcript of Record, hereinafter referred to as TR (157391) 2-5; TR (157406) 2; TR (157667) 2-3.] The three indictments were assigned to the same day for trial by a jury. Under Kentucky law, the jury ordinarily determines guilt or innocence and assesses any punishment to be imposed in a unitary proceeding. However, defense counsel tendered a written pre-trial motion to allow the jury to first determine the question of guilt and to determine the sentence to be imposed in a separate proceeding if guilt was found. The purpose of this proposal was to allow the introduction of additional evidence on punishment alone to aid the jury in making an informed judgment on sentencing [TR (157391) 36; TR (157406) 9; TR (157667) 26]. In support of his motion for bifurcation, counsel for the defense filed a memorandum of authorities and a series of newspaper articles which demonstrated Whorton's background as a soldier of recognized valor in the Korean War (TR (157391) 36-39; TR (157406) 9-12; TR (157667) 26-30]. During the trial, this motion was renewed by means of a motion for mistrial for failure to bifurcate the proceedings (Transcript of Evidence, hereinafter referred to as TE 172-173). All of these motions were overruled by the court [TR (157391) 36; TR (157406) 9; TR (157667) 26; TE 170, 173]. Defense counsel also filed a written pre-trial motion to elect, in which he requested the court to proceed under either 157391, 157406 or 157667 or that the cases be tried separately [TR (157391) 35]. The purpose of this motion was to permit Whorton to present a factual defense to the two earlier indictments without waiving his privilege

against self-incrimination with respect to the most recent robbery (TE 172-173). This motion was also overruled by the court.

At the conclusion of the evidence, the trial court read and presented to the jury a total of twenty separate instructions and thirty-two form verdicts (Appendix 17-40). [Under Kentucky law, these instructions are presented to the jury orally before closing arguments and are furnished to the jury in writing for use during deliberations.] The trial court also rejected five simple instructions tendered by defense counsel relating to the burden of proof, the presumption of innocence, reasonable doubt and related matters (Appendix 8-11). At the close of its deliberations, the jury found Whorton guilty of all charges and imposed a maximum penalty for each crime. On September 29, 1977, the trial court entered judgment in accordance with the verdict sentencing Whorton to two hundred years for ten robberies, twenty years for two attempted robberies, and ten years for two charges of wanton endangerment. The wanton endangerment convictions were held by the Kentucky Supreme Court to have merged into the robbery convictions. The remaining convictions were reversed for a new trial because the jury was not given the requested instruction on the presumption of innocence.

ARGUMENT

THE SUPREME COURT OF KENTUCKY CORRECTLY INTERPRETED AND APPLIED THE PRIOR DECISION OF THIS COURT IN *TAYLOR V. KENTUCKY*.

The petitioner contends that the Kentucky Supreme Court misinterpreted and misapplied the holding of this Court in *Taylor v. Kentucky*, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978). Specifically, the petitioner states, on page 5 of its brief:

> The Supreme Court of Kentucky has misinterpreted and misapplied a prior decision of this court, *Taylor v. Kentucky*, 436 U.S. 478 (1978), to the instant case. That court has interpreted *Taylor v. Kentucky* "to mean that when an instruction on the presumption of innocence is asked for and denied there is a reversible error." 570 S.W.2d, at 633. This interpretation requires automatic reversal in every such case regardless of the circumstances of the case or the evidence adduced at trial. The petitioner respectfully submits that such an interpretation of *Taylor v. Kentucky* is incorrect.

Further, the petitioner contends that *Taylor* is limited to its own facts and does not establish a broad constitutional principle. In the alternative, the petitioner urges that, if *Taylor* is held to a standard of constitutional significance, it should be subject to the harlmess-error rule as enunciated in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) and *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969). In view of the judicial history of this issue, especially as it applies in Kentucky, the petitioner is clearly in error.

A. STATE PROCEEDINGS

The Supreme Court of Kentucky held in the case at bar that *Taylor* enunciated a constitutional principle of general applicability and declined to speculate whether the principle was subject to the harmless error rule. The applicability of the harmless error doctrine to this issue was thoroughly presented by the petitioner to the Kentucky Supreme Court in a Petition for Rehearing and Modification, which was denied on October 10, 1978. Moreover, the state court demonstrated its agreement with *Taylor* by amending state procedural rules to require a presumption of innocence instruction in *every* criminal case, whether requested or not. (Kentucky Rules of Criminal Procedure 9.56, effective July 1, 1978).

On February 27, 1979, the Kentucky Supreme Court rendered an opinion in *Watson v. Commonwealth*, File No. 78-SC-300-MR, which reversed a conviction due to the trial court's failure to comply with *Whorton*. In an unanimous opinion, the court clarified its position in *Whorton* and stated:

> In Whorton, supra, we elected as a matter of state law not to engage in the mental gymnastics inherent in the application of the harmless error doctrine. We chose simple prophylaxis over Talmudic hair splitting . . . We perceive no reason to retreat from Whorton, supra.

Thus, it appears that the Supreme Court of Kentucky elected from the outset to create a uniform state procedural requirement that such an instruction be given in order to avoid the problems which it might otherwise face in attempting to apply a harmless error

rule on a case by case basis. Additionally, the Kentucky Supreme Court has summarily reversed all pending convictions in which the *Taylor-Whorton* error was raised. *Watson*, therefore, indicates that the Supreme Court of Kentucky is unwilling as a matter of state law to devote its energies to the application of a harmless error test. By this action, the court has achieved its stated objective of minimizing the impact of *Taylor* without any appreciable expenditure of scarce judicial resources.

B. MOOTNESS AND LACK OF JURISDICTION

Article III of the United States Constitution establishes that the judicial power of the federal courts extends only to such questions as arise in a "case or controversy." In *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937), the Court defined "case or controversy" as a "real and substantial controversy" which must be "definite and concrete." Chief Justice Hughes distinguished a "justiciable controversy" from one which is "hypothetical," "academic or moot." See also *Liner v. Jafco, Inc.*, 375 U.S. 301, 84 S.Ct. 391, 11 L.Ed.2d 347 (1964). In *Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961), justiciability is defined as a "legal concept with a fixed content or susceptible of scientific verification. Its utilization is the result of many subtle pressures . . . " This interpretation is further elucidated in *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968), where the Court concluded that the words "case or controversy" have an "iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government." Moreover, in determining justiciability, the Court's analysis suggests that there is no justiciable controversy (1) where the parties seek an advisory opinion, (2) *where the question sought to be adjudicated has been mooted by subsequent developments*, or (3) where there is no standing to maintain the action. *Flast v. Cohen, supra* at 88 S.Ct. 1950 (emphasis added). Cf. *Gilligan v. Morgan*, 413 U.S. 1, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973); Wright, § 12 *Law of Federal Courts*, 2dEd. (1970).

In *Ashcraft v. State of Tennessee*, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192 (1943), the Court determined that its responsibility in disposing of cases must be dictated by that which "justice may require." Moreover, "in determining what justice does require, the Court is bound to consider any change, either in fact in law, which has supervened since the judgment was entered." See also *Patterson v. Alabama*, 294 U.S. 600, 55 S.Ct. 575, 79 L.Ed. 1082 (1935). This search for justiciability has led to several well-established principles whose origins far antedate the holdings in *Flast* or *Aetna Life*. Indeed, as early as 1872, it was a settled rule that, "where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, [Supreme Court] jusridiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment." *Klinger v. State of Missouri*, 80 U.S. 257, 13 Wall. 257, 20 L.Ed. 635 (1872); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961); *Fox Film Corp. v. Muller*, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935).

Thus, the Court's power of judicial review is subject to restrictions drawn both by Article III and by self-imposed judicial restraint. In *Herb v. Pitcairn*, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1945), the Court concluded, at 65 S.Ct. 463:

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Cf. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977); *Williams v. Kaiser*, 323 U.S. 471, 65 S.Ct. 363, 89 L.Ed. 398 (1945). Also, in *Black v. Cutter Laboratories*, 351 U.S. 292, 76 S.Ct. 824, 100 L.Ed.2d 1188 (1956), the Court noted that, to evaluate whether an opinion rests on adequate state grounds, it must look beyond the "broad sweep of the language" to find the precise grounds on which the judgment rests. "This means no more than that we should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds." Id. at 76 S.Ct. 827.

Furthermore, where the Court finds it unnecessary to decide any federal question, and where it appears that the judgment below rests on an independent and adequate state ground, the proper course is to dismiss the Writ of Certiorari as improvidently granted, if one has been issued. *Zacchini, supra; Aikens v. California*, 406 U.S. 813, 92 S.Ct. 1931, 32 L.Ed.2d 511 (1972); *Wilson v. Loew's, Inc.*, 355 U.S. 597, 78 S.Ct. 526, 2 L.Ed.2d 519 (1958); *Fox Film Corp v. Muller, supra; Eustis v. Bolles*, 150 U.S. 361, 14 S.Ct. 131, 37 L.Ed. 1111 (1893).

For the foregoing reasons, this Court has no jurisdiction to review decisions based on state law where the nonfederal grounds are not so inextricably "interwoven" with federal grounds as "not to be an independent matter." Cf. *Herb v. Pitcairn, supra; Alton R. Co. v. Illinois Commerce Com.*, 305 U.S. 548, 59 S.Ct. 340, 83 L.Ed. 344 (1939); *Fox Film Corp. v. Muller, supra; Enterprise Irr. Dist. v. Farmers' Mut. Canal Co.*, 243 U.S. 157, 37 S.Ct. 318, 61 L.Ed. 644 (1917). The decision of the court of last resort in the state system is viewed as conclusive evidence of the state law on the subject involved. See. *Williams v. Kaiser, supra; Fox River Paper Co. v. Railroad Commission of Wis.*, 274 U.S. 651, 47 S.Ct. 669, 71 L.Ed. 1279 (1927); *Clarke v. Clarke*, 178 U.S. 186, 20 S.Ct. 873, 44 L.Ed. 1028 (1900); *Holmes v. Jennison*, 39 U.S. 540, 14 Pet. 540, 10 L.Ed. 579 (1840).

In the case at bar, the Kentucky Supreme Court determined in *Watson*, as a matter of state law, that it will not utilize scarce judicial energy in order to apply the *Chapman-Harrington* harmless-error rule to the *Taylor-Whorton* situation. This ruling is based on the state court's very real concern for the expeditious implementation of state rules and objectives relating to the presumption of innocence. Although it is evident that *Whorton* accurately applied this Court's decision as enunciated in *Taylor*, it is now equally clear that the automatic reversal of the conviction in *Whorton* is based on independent and adequate state grounds. As such, the question no longer presents a justiciable "case or controversy," and the Writ of Certiorari should be dismissed for lack of jurisdiction or mootness.

C. THE STATE COURT CORRECTLY APPLIED TAYLOR

In the majority opinion in *Whorton* by Chief Justice Palmore, the court noted that *Taylor* contains "no hint" as to the appropriateness of applying the *Chapman-Harrington* test to the present situation. However, the court also observed that although it may be desirable to hold "this newly-declared constitutional requirement" subject to the harmless error rule, "we are afraid it might not stick." In light of this viewpoint, the court read *Taylor* to mean that "when an instruction on the presumption of innocence is asked for and denied there is a reversible error."

The opinion in *Whorton* evidences a reluctance to circumscribe the decision in *Taylor* by speculating about the subjective reasons leading to this Court's opinion. The respondent shares this reluctance. Nonetheless, careful analysis of *Taylor* appears to disclose a clear intent of this Court to include the presumption of innocence among the basic components of a fair trial. Justice Brennan's concurring opinion in *Taylor* quotes *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976), reaffirming the belief that "the presumption of innocence . . . is a basic component of a fair trial under our system of criminal justice . . . It follows from this proposition, as is clear from the court's opinion, that trial judges should instruct the jury" on this presumption whenever such an instruction is requested. In addition, the majority opinion in *Taylor* treats the presumption of innocence as an "axiomatic and elementary" principle, the importance of which is not to be overlooked or underestimated. Furthermore, Justice Powell relied on the holding in

Coffin v. United States, 156 U.S. 432, 15 S.Ct. 394, 39 L.Ed. 481 (1895), as a means of elucidating this Court's position. In *Coffin*, the Court recognized the presumption of innocence as a "fundamental principle," equally as weighty as the reasonable doubt standard. In *Taylor*, this Court appeared to view the *Coffin* principles with approval, and it proceeded to recognize several other factors which bear on the significance of this presumption. Specifically, this Court noted the "purging effect" of the instruction and the fact that the "ordinary citizen may draw significant additional guidance from an instruction."

The Kentucky Supreme Court correctly interpreted *Taylor* as establishing a constitutional principle of general applicability. However, since this Court did not specifically address the issue of the application of the harmless error rule in *Taylor*, the Kentucky Court concluded that this Court might have left open the applicability of the harmless error rule. On the basis of this interpretation, the state court then declined to play constitutional roulette with Whorton's due process rights and chose instead as a matter of state law not to apply a harmless error test in Kentucky. Because the state court correctly interpreted and applied *Taylor*, the result which it ultimately reached as a matter of state law is of no concern of this Court.

D. THE HARMLESS ERROR RULE IS INAPPLICABLE

A review of case law relating to harmless constitutional error establishes principles from which it may be readily seen that the failure to give a presumption of innocence instruction is not subject to the harmless error rule. In *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), at 87 S.Ct. 828, the Court ratified earlier cases holding that some constitutional rights are "so basic to a fair trial that their infraction can never be treated as harmless error." In the footnote accompanying the text, the Court noted the following errors, which are so fundamental as to preclude a finding of harmless error: *Payne v. State of Arkansas*, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958) (coerced confession); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (right to counsel), [reaffirmed in *Holloway v. Arkansas*, ___ U.S. ___, 98 S.Ct. 1173, ___ L.Ed.2d ___ (1978)]; *Tumey v. State of Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (impartial judge).

In *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969), the Court held that a denial of the right to confront a nontestifying co-defendant whose out-of-court statements were admitted into evidence was subject to the harmless error rule. However, the holding in *Harrington* appears to have been stripped of its vitality by the subsequent holding in *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). In *Davis*, defense counsel was not permitted on cross-examination to show that the prosecuting witness had a juvenile record which might have made him susceptible to prosecutorial influence. The court squarely held, at 94 S.Ct. 1111:

> Petitioner was thus denied the right of effective cross-examination which "would be constitutional error of the first magnitude and *no amount of showing of want of prejudice would cure it. Brookhart v. Janis*, 384 U.S. 1, 3, 86 S.Ct. 1245, 1246, 16 L.Ed.2d 314." *Smith v. Illinois*, 390 U.S. 129, 131, 88 S.Ct. 748, 750, 19 L.Ed.2d 956 (1968). (Emphasis added).

By this holding, the right of confrontation appears to have joined the other fundamental rights previously noted in *Chapman*. Thus, any constitutional right which affects the integrity and fundamental fairness of the proceedings is exempt from the harmless error rule. Unquestionably, the presumption of innocence is such a fundamental right.

Although the exact origin of the ancient and revered presumption of innocence is unknown, it has been traced to Athens, Sparta and Deuteronomy. Definitions of the presumption are understandably hazy. Nonetheless, it is generally described as a "conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted, unless he is proven to be guilty." *Coffin v. United States*, 156 U.S. 432, 15 S.Ct. 394, 39 L.Ed. 481 (1895). In the United States, the concept of presumed innocence is predicated "not upon any express provision of the federal constitution, but upon ancient concepts antedating the development of the common law." *Reynolds v. United States*, 238 F.2d 460 (9th Cir. 1956).

In *United States v. Thaxton*, 483 F.2d 1071 (5th Cir. 1973), the court held that a presumption of innocence instruction was essential, since it served a two-fold

function:

> First as a corollary to the standard of proof in a criminal case, it serves to remind the jury that the prosecution bears the burden of persuading the factfinder of the defendant's guilt beyond a reasonable doubt such that in the absence of such proof that the jury must acquit. Second, it cautions that jury to put away from their minds all the suspicion that arises from the arrest, the indictment and the arraignment, and to reach their conclusion solely from the legal evidence adduced.

The second function of the instruction as stated above, is seen as a warning mechanism to combat the "inherent characteristic of human nature to assume that a person who is arrested is guilty of the crime with which he is charged." "Criminal Procedure—Presumption of Innocence," 24 Vanderbilt L. Rev 412 (March 1971).

Simon Greenleaf, an eminent nineteenth century legal scholar, found that the presumption is based on the belief that men do not usually commit crimes. In spite of the logic of this concept, it is probable that "observation of the entire pretrial criminal process involving the police, the legal forces of the state, and the investigation of the grand jury will create the natural suspicion that the accused is guilty." 1 Greenleaf, *Evidence* § 34 (7th ed. 1854). Therefore, the presumption of innocence, like a "great many presumptions, if not most, [is] rooted in a mixture of the two soils, probability on the one hand, independent procedural or social policy on the other." McCormick, "Charges on Presumptions and Burden of Proof," 5 North Carolina L. Review 291 (1927). This rationale leads to the conclusion that the positive statement of

the presumption should not be omitted from the jury instructions, since it acts as an important reminder to the jury. Cf. *United States v. Press*, 336 F.2d 1003 (2d Cir. 1964). The failure to tender an instruction on the presumption not only is an injustice to the due process rights of the accused, but it evidences a state of myopia which impairs the integrity of the judicial process.

In *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976), the Court concluded that the right to a fair trial is a "fundamental liberty" secured by the Fourteenth Amendment. The presumption of innocence, "although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." See also *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). At a very early date, in *Coffin v. United States, supra*, the Court analyzed the exact issue presently under consideration. The Court therein held that the refusal to give the requested instruction was reversible error, and stated, at 156 U.S. 460:

> The inevitable tendency to obscure the results of a truth, when the truth itself is forgotten or ignored, admonishes that the protection of so vital and fundamental a principle as the presumption of innocence be not denied, when requested, to any one accused of crime.

Judge Wilhoit, in his *Taylor* dissent, also recognized that the value of the presumption of innocence diminishes where the trial court fails to properly educate the jury, when he stated, at 551 S.W.2d 814:

> There is certainly no such presumption in the minds of the jurors about to try a case. In fact, by the time the indictment is read to the jury the

> opposite presumption is likely to be present in their minds. The law builds in the presumption of innocence, but it is of no use to the defendant if the jury is never told about it.

Indeed, this viewpoint reflects the modern trend of cases in both state and federal courts which have continued to stress the crucial nature of this presumption.

In *Commonwealth v. Boyd*, 326 N.E.2d 320 (Mass. 1975), the court held that the function of this presumption is to emphasize to the jury that the finding of indictment grounds is not to be regarded as a circumstance tending to create unfavorable impressions against the accused. Courts must guard against factors which undermine the fairness of the fact-finding process and dilute the principle that guilt is to be established beyond a reasonable doubt. *State v. Tolley*, 226 S.E.2d 353 (N.C. 1976). The presumption of innocence must also be distinguished from the reasonable doubt standard, since each serves an independently significant function. *United States ex rel Castleberry v. Sielaff*, 446 F.Supp. 451 (D.C. Ill. 1978); *United States v. Lawson*, 507 F.2d 433 (7th Cir. 1974); *Holland v. United States*, 209 F.2d 516 (10th Cir. 1954); *Commonwealth v. Jones*, Pa.Super., 327 A.2d 638 (1974); J. Wigmore, *Evidence* (3rd ed. 1940) at 407.

In addition to the foregoing, there are several reasons for exempting specific errors from the harmless error rule. If a trial court commits mere evidentiary or procedural error, the record must be expected to contain sufficient information from which the impact of the error can be fairly assessed. By contrast, when an *error of omission* of the first constitutional magnitude

has occurred, the record simply does not contain an adequate basis for determining the impact of the error. For example, in *Holloway v. Arkansas, supra*, the same attorney represented multiple defendants. The potential for a conflict of interest was held to render his assistance ineffective, even though no actual ineffectiveness appeared on the record. Indeed, any other holding would have required the reviewing court to engage in speculations about the subjective mental state of the attorney. See also *Gideon v. Wainwright, supra*, in which the impossibility of determining the effect of the denial of counsel was noted.

The same practical impediment to the application of the harmless error rule in cases where the right to counsel has been denied also exists in the other classes of cases which have been exempted from the rule. In *Davis v. Alaska, supra*, the Court appears to have recognized the impossibility of attempting to predict the impact on the jury which defective confrontation and cross-examination might have had. Similarly, in *Payne v. Arkansas, supra*, the Court refused to speculate on the impact which a coerced confession might have had on the jury. Again, in *Tumey v. Ohio, supra*, the Court adopted a prophylactic rule in order to avoid inquiring into the subjective mental state of a judge with a financial interest in the litigation.

It is obvious that the same impediment to the application of the harmless error rule exists whenever a presumption of innocence instruction is denied. In order to assess the potential impact of the required instruction, a reviewing court would have to engage in considerable speculation about the attitudes of the jurors toward the presumption of innocence. The

reviewing court would have to speculate about the thought processes of the jurors and their discussion during the course of the deliberation. Such speculation vitiates the very reasonable doubt standard which gives rise to the presumption of innocence.

In *Braley v. Gladden*, 403 F.2d 858 (9th Cir. 1968), the court discussed the importance of the presumption of innocence instruction and noted that, while the jury is required to presume the accused is innocent until he is proved guilty, the court also presumes that the jury applies *only* that law of which it is informed by the judge. See also *People v. Hill*, Colo., 512 P.2d 257 (1973). In *Braley*, the court concluded that, regardless of the state of the evidence, an instruction is required. The court further stated, at 403 F.2d 861:

> The presumption of innocence is not merely a papier-mache figure for dramatic display in the courtroom; it is a reality without which trials become mere playacting with the verdict residing in the judge's pocket before the jury is sworn. Even if in an hypothetical case, the evidence of guilt piles as high as Mt. Everest on Matterhorn, even if the District Attorney conscientiously believes the defendant to be as guilty as Cain, and no matter with what certainty the Judge views the culpability of the accused at the bar, the defendant is still entitled to all the safeguards of a fair trial as announced in the Constitution, and the law of the land.

An overview of state decisions which have dealt with the question of whether a presumption of innocence instruction should be given appears to indicate approval of the *Taylor* decision. The gravity with which the state courts perceive the presumption of innocence

is illustrated in several cases: In *Williams v. State*, Ark., 535 S.W.2d 842 (1976), the court stated that the "presumption of innocence alone puts in issue the truth and credibility of all the evidence offered against the accused." In *People v. Weinstein*, Ill., 220 N.E.2d 432 (1966), the court declared that the presumption is founded upon "first principles of justice" and is intended not to protect the guilty but to prevent, so far as human agencies can, conviction of the innocent. Moreover, the presumption "cloaks citizens from birth to death." *State v. Rosen*, Mich.App., 171 N.W.2d 488 (1969). See also *Commonwealth v. Mayhugh*, 233 Pa.Super. 24, 336 A.2d 379 (1975). The presumption is viewed as an uncalled witness for the defense and it disappears only upon guilt proved beyond a reasonable doubt. *Halquist v. State*, Tex., 489 S.W.2d 88 (1972).

Other state courts have described the presumption of innocence in the following terms: "essential element of a fair trial," *Commonwealth v. Davis*, Pa., 351 A.2d 642 (1976); "foundation for our system of criminal justice," *People v. Kanan*, Colo., 526 P.2d 1339 (1974); "basic part of organic law," *Hill v. State*, Fla.App., 209 So.2d 689 (1968).

A number of federal courts have also recognized that the presumption of innocence instruction is anecessary component of due process. See: *United States v. Fernandez*, 496 F.2d 1294 (5th Cir. 1974); *United States v. Pepe*, 501 F.2d 1142 (10th Cir. 1974); *United States ex rel. Campagne v. Follette*, 306 F.Supp. 1255, *affirmed*, 419 F.2d 833 (D.C.N.Y. 1969), *cert. denied* sub nom. *Campagne v. Follette*, 400 U.S. 834, 91 S.Ct. 69, 27 L.Ed.2d 66 (1970); *McDonald v. United States*, 284 F.2d 232 (D.C. Cir. 1960).

Thus, it now appears to be the majority view that the failure to give a requested instruction on the presumption of innocence creates an error of constitutional dimension which requires automatic reversal. See *Ealey v. State*, Ga.App., 232 S.E.2d 620 (1977); *State v. McHenry*, Wash., 558 P.2d 188 (1977); *State v. Cokeley*, W.Va., 226 S.E.2d 40 (1976); *People v. Donald*, 21 Ill.App.3d 696, 315 N.E.2d 904 (1974); *People v. Vann*, 115 Cal.Rptr. 352, 524 P.2d 824 (1974); *People v. Hill*, 512 P.2d 257 (1973); *Whaley v. Commonwealth*, Va., 200 S.E.2d 556 (1973); *State v. Henderson*, N.M.App., 466 P.2d 116 (1970).

In the case at bar, the petitioner seeks to have this Court limit *Taylor* to its facts, thereby avoiding the repercussions of a due process application of *Taylor* in every case. Alternatively, the Attorney General suggests that, even if *Taylor* is found to have enunciated a constitutional principle of general applicability, it should be limited by the *Chapman-Harrington* rule. This position not only demonstrates a myopic view of the fundamental social policy which underlies *Taylor*, but also serves as an impediment to the state court's express interest in judicial economy. Either argument proposed by the petitioner would necessitate the use of "mental gymnastics" sought to be averted by the state court. If the presumption of innocence is only constitutionally required in exceptional cases, then each case must be scrutinized thoroughly in order to ascertain whether extraneous circumstances exist which would activate the implementation of *Taylor*. On the other hand, if the harmless-error rule is to be applied, the court must go through the similar exercise of determining if the case is within the rule or not. This

creates the precise situation which the Kentucky Supreme Court seeks to circumvent. In view of the court's amending of RCr 9.56, the opinion in *Whorton* and the subsequent decision in *Watson*, there is little else the state court can do to establish its position on this subject. It has wisely avoided the pitfalls inherent in any attempt to apply the harmless error rule. This Court should do likewise.

E. THE ERROR WAS NOT HARMLESS

Even if it is assumed that the failure to give an instruction on the presumption of innocence might sometimes be harmless, it was not harmless in the case at bar. The state court opinion in *Whorton* reflected this viewpoint when it stated: "We know that in actuality Taylor was no more 'prejudiced' in his case than Whorton was in this one." Additionally, the fact that Whorton sought to separate the guilt and punishment phases of the trial, so that he would be able to present mitigating circumstances in the latter, demonstrates his compelled reliance on the presumption of innocence. Moreover, the fact that all three indictments were tried jointly, despite Whorton's motion to elect and sever, also forced him to heavily rely on the weight which the presumption would have with the jury. In order to present evidence in mitigation, or to present a defense to two of the three indictments, Whorton would have had to forego his right to remain silent on the question of guilt under the third indictment. The fact that the trial court refused the motions to bifurcate and to sever caused Whorton

to rely more heavily on the presumption of innocence than he might otherwise have done. Having made a difficult election between constitutional rights, he should at least have been given the full benefit of his election.

Another reason why the error cannot be considered to be harmless in the case at bar stems from the voluminous and complicated nature of the proceedings. Whorton was charged with fourteen separate offenses. The jury was required to sort through twenty separate instructions and thirty-two form verdicts. Under Kentucky law, the instructions are read to the jury before closing arguments, and counsel is limited to applying the law contained in the instructions to the facts of the case. This does not mean that counsel may not argue for the presumption of innocence, but it does mean that the jury knows that his argument is not based upon the law recognized by the trial court. The order of proceedings also means that the trial judge cannot make an individualized decision whether the arguments of counsel heighten the need for the instruction. Under these circumstances, it should not be assumed that the jury carried the presumption of innocence into its deliberations. To the contrary, the submission of such a voluminous case to the jury without an instruction on the presumption of innocence creates a likelihood that the jury will adjudicate factual guilt on one or two charges and then presume the defendant to be guilty of the others. This pyramiding affect is also likely to promote the imposition of stiffer penalties than the jury might have imposed if it had convicted the defendant of only some of the offenses. Inded, in the case at bar, the jury convicted Whorton of every offense and recommended

the maximum penalty for each one. For these reasons also, the failure to give a requested instruction cannot be treated as harmless in the case at bar.

CONCLUSION

The respondent respectfully requests that the Writ of Certiorari should be dismissed for lack of jurisdiction or mootness on the basis of the Kentucky Supreme Court's recent decision in *Watson v. Commonwealth*. If this Court does not find *Watson* dispositive of this case, then the judgment of the Supreme Court of Kentucky reversing the conviction of Harold Whorton should be affirmed in accordance with *Taylor v. Kentucky*.

/s/
TERENCE R. FITZGERALD
Chief Appellate Defender of the
Jefferson District Public Defender
200 Civic Plaza
701 West Jefferson Street
Louisville, Kentucky 40202
(502) 587-3800
Counsel for Respondent

/s/
PAUL G. TOBIN
Jefferson District Public Defender
of Counsel

FOR ARGUMENT

Supreme Court, U. S.
FILED
APR 6 1979
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-749

COMMONWEALTH OF KENTUCKY - Petitioner

versus

HAROLD WHORTON - - - - - Respondent

On Petition For A Writ of Certiorari To The
Supreme Court of Kentucky

REPLY BRIEF FOR PETITIONER

ROBERT F. STEPHENS
Attorney General

PATRICK B. KIMBERLIN, III
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Counsel for Petitioner

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-749

COMMONWEALTH OF KENTUCKY - - *Petitioner*

v.

HAROLD WHORTON - - - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

REPLY BRIEF FOR PETITIONER

THE DECISION OF THE KENTUCKY SUPREME COURT IN *WATSON* v. *COMMONWEALTH*, KY., ___ S. W. 2d ___ (RENDERED FEB. 27, 1979) DOES NOT RENDER MOOT THE CASE AT BAR.

In a Suggestion of Mootness and in his Brief, the respondent contends that the case at bar is now moot in light of a recent decision of the Kentucky Supreme Court in *Watson* v. *Commonwealth*, Ky., ___ S. W. 2d ___ (rendered Feb. 27, 1979), wherein the court concluded,

> "In Whorton, supra, we elected as a matter of state law not to engage in the mental gymnastics inherent in the application of the harmless error

> doctrine. We chose simple prophylaxis over Talmudic hair splitting. See Darnell v. Commonwealth, Ky., 558 S. W. 2d 590, 596 (1977) (Lukowsky, J., dissenting). We perceive no reason to retreat from Whorton, supra." (Petitioner's Appendix to Reply Brief, p. . .).

The petitioner respectfully submits that the foregoing does not moot the case at bar.

The petitioner has previously maintained in its Brief on the Merits that the Kentucky Supreme Court in *Whorton* v. *Commonwealth,* Ky., 570 S. W. 2d 627 (1978), has misinterpreted and misapplied the decision of this Court in *Taylor* v. *Kentucky,* 436 U. S. 478 (1978), to the case *sub judice.* Compare *Republic Steel Corp.* v. *Maddix,* 379 U. S. 650, 652 (1965); *Oregon* v. *Mathiason,* 429 U. S. 492 (1977). The thrust of petitioner's argument is twofold: (1) that *Taylor* v. *Kentucky, supra,* is limited to its own facts, creating no new constitutional requirement, and is necessarily of narrow application and, (2) *alternatively,* if *Taylor* v. *Kentucky, supra,* does establish a new constitutional requirement necessitating that an instruction on presumption of innocence must be given when requested to avoid constitutional error, regardless of the circumstances, then the *Chapman-Harrington* Rule[1] should be applied.

The application of the *Chapman-Harrington* Rule presupposes that an error of federal constitutional magnitude has in fact occurred. Thus, the absence of a federal constitutional error having occurred, one does

[1] *Chapman* v. *California,* 386 U. S. 18 (1967) and *Harrington* v. *California,* 395 U. S. 250 (1969).

not reach the issue of whether the *Chapman-Harrington* Rule should or should not be applied to this case. Here, there is no need for this Court to reach the *Chapman-Harrington* Rule issue since the most striking aspect of the Kentucky Supreme Court's misinterpretation is their conclusion that this Court in *Taylor* allegedly created a "newly-declared constitutional requirement" that "when an instruction on the presumption of innocence is asked for and denied there is a reversible error." 570 S. W. 2d at 632-633.

It is the petitioner's position that the decision in *Taylor* v. *Kentucky, supra,* did not create any newly-declared constitutional requirement that a rejected instruction on presumption of innocence requires automatic reversal of a state conviction. To the contrary, it appears quite clear that the Opinion in *Taylor* v. *Kentucky* is limited to its own facts and conspicuously avoids creating any constitutional requirement mandating that state courts must instruct on the presumption of innocence. Thus, the holding in *Whorton* that the failure to give a requested instruction on presumption of innocence requires automatic reversal on federal due process grounds, is based upon a faulty premise.

Perusal of the *Taylor* Opinion clearly establishes that it was only due to the cumulative effect of many potentially damaging factual circumstances occurring during the course of the trial, which diluted Taylor's "constitutional right to be judged solely on the basis of proof adduced at trial," that gave rise to a violation of the due process guarantee of fundamental fairness in the absence of an instruction on presumption of in-

nocence. Petitioner maintains that in the absence of similar extraordinary circumstances as those which occurred in the *Taylor* case, no constitutional error occurs, and there would be no constitutional necessity for a state trial court to grant a requested instruction on presumption of innocence.

Given such negative circumstances, the purging effect of such an instruction, was necessary in *Taylor* v. *Kentucky* as one means of protecting Taylor's constitutional right to be judged solely on the basis of proof adduced at trial. On the other hand, examination of the facts in the instant case unequivocally establishes that no such negative circumstances occurred here as in *Taylor*. Therefore, on its facts, the case at bar does not rise to federal constitutional magnitude. Accordingly, since this case did not involve a federal constitutional error, there is no need to reach the issue of whether or not the *Chapman-Harrington* Rule should apply.

Assuming *arguendo* that the issue of whether or not the *Chapman-Harrington* Rule should be applied to the case at bar is reached, the petitioner acknowledges that the refusal of the Kentucky Supreme Court in the *Watson* case to apply that Rule may very well constitute the creation by that court of a state standard more favorable to an accused than any federal constitutional protections which might be accorded by *Taylor* v. *Kentucky*. There appears to be nothing in the *Chapman-Harrington* Rule which would necessarily preclude a state court from deciding, as a matter of state law, that a particular federal constitutional

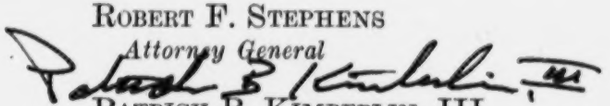
concept or principle is a ground for automatic reversal of a criminal conviction. However, the petitioner feels it necessary to point out that there is no language in the *Whorton* decision which would support the subsequent holding of the Kentucky Supreme Court, seven months later, in *Watson* v. *Commonwealth, supra,* that in *Whorton* the Kentucky Supreme Court refused to apply the *Chapman-Harrington* Rule as a matter of state law. To paraphrase the Kentucky Supreme Court in the *Whorton* case, it would have been considerate of that court to have indicated somewhere in *Whorton* that, as a matter of state law, it did not intend to apply the *Chapman-Harrington* Rule to cases involving the rejection of a requested instruction on presumption of innocence. After all, it might have reasonably been foreseen that the refusal to apply the harmless-error rule would have adverely effected a large number of cases in the Commonwealth of Kentucky.

CONCLUSION

For the foregoing reasons, the petitioner respectfully submits that the instant case is not moot.

Respectfully submitted,

ROBERT F. STEPHENS
Attorney General



PATRICK B. KIMBERLIN, III
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

Counsel for Petitioner

PROOF OF SERVICE

I, Patrick B. Kimberlin, III, Counsel for the Petitioner, hereby certify that three (3) copies of the foregoing Reply Brief for Petitioner were mailed, postage prepaid, this 4th day of April, 1979, to Hon. Terrence R. Fitzgerald, Chief Appellate Defender, Jefferson District Public Defender, 200 Civic Plaza, 701 West Jefferson, Louisville, Kentucky 40202, Counsel for Respondent.

Patrick B. Kimberlin, III

PATRICK B. KIMBERLIN, III
Assistant Attorney General

APPENDIX

RENDERED: FEBRUARY 27, 1979

SUPREME COURT OF KENTUCKY

78 SC 300 MR

CHARLES RAY WATSON - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Pulaski Circuit Court
Honorable Phillip K. Wicker, Judge
Nos. 77-F-932, 77-F-933, 77-F-934, 77-F-935

OPINION OF THE COURT BY JUSTICE LUKOWSKY—REVERSING

Watson was convicted of four counts of first-degree wanton endangerment, KRS 508.060, two counts of theft by unlawful taking of property of a value over $100.00, KRS 514.030, and five counts of terroristic threatening, KRS 508.080. He was sentenced to five years' imprisonment on each wanton endangerment count, one year on each theft count and twelve months on each terroristic threatening count. The wanton endangerment sentences were to be served consecutively. The remaining sentences were to be served concurrently with each other and the wanton endangerment sentences. He appeals. We reverse and remand.

Watson drove his car into a ditch. Police officers, Mike Walters and Homer Wesley, arrested him for public drunk-

enness and placed him in the rear of the police cruiser. They also arrested Watson's brother for public drunkenness and placed him in the rear of the police cruiser. They did not handcuff either of the men. The police told the other people present at the scene that they were free to leave. They returned to their cruiser and noticed that a shotgun and a nightstick were missing. Watson pointed the shotgun at the police officers and ordered them to let him and his brother out of the cruiser. He threatened to kill the police officers if they did not follow his instructions or if they attempted to use the radio. Watson then held the police officers and Hiram Daulton, Charles Daulton and Darrell Brock, who were also present at the scene of the accident, hostage and directed them to get his car out of the ditch. The hostages all safely made their escape when Watson's attention was diverted. Watson fired four shots at them as they fled. Fortunately, all the shots missed. Watson took the police cruiser and fled the scene. He was arrested the next day.

Watson contends that under the facts of this case KRS 505.020 prohibits his conviction of both wanton endangerment and terroristic threatening of the same persons.

KRS 505.020 (1) (a) provides:

> "When *a single course of conduct* of a defendant may establish the commission of more than one offense, he may be prosecuted for each such offense. He may not, however, be convicted of more than one offense when: (a) One offense is included in the other, as defined in subsection (2)." (Our italics.)

KRS 505.020 (2) (d) provides:

> "A defendant may be convicted of an offense that is included in any offense with which he is formally charged. An offense is so included when:

> (d) It differs from the offense charged only in the respect that a less serious injury or *risk of injury* to the same person, property or public interest suffices to establish its commission." (Our italics).

In order to convict on the terroristic threatening counts the jury had to believe that Watson threatened to shoot Mike Walters, Homer Wesley, Charles Daulton, Hiram Daulton and Darrell Brock with a shotgun. In order to convict on the wanton endangerment counts the jury had to believe that Watson fired a shotgun at Mike Walters, Homer Wesley, Hiram Daulton and Darrell Brock. The only difference between the threat and the act in this case is the increased risk of injury to Mike Walters, Homer Wesley, Hiram Daulton and Darrell Brock. Consequently, Watson should not have been convicted of the terroristic threatening of these men after he had been convicted of wantonly endangering them. Simply put, the terroristic threat is included in the wanton endangerment. Cf. Luttrell v. Commonwealth, Ky., 554 S. W. 2d 75, 78 (1977).

However, we are unable to protect Watson's rights by merely vacating four of the terroristic threatening convictions, because at trial he requested and was refused an instruction on the presumption of innocence. Our decision in Whorton v. Commonwealth, Ky., 570 S. W. 2d 627 (1978), cert. granted sub nom. Kentucky v. Whorton, 47 U.S.L.W. 3450 (1979), entitles him to a new trial on all charges of which he was convicted.

The Commonwealth urges us to overrule our decision in Whorton, supra, and apply the "Chapman-Harrington Harmless Error Doctrine." In Whorton, supra, we elected as a matter of state law not to engage in the mental gymnastics inherent in the application of the harmless error doctrine. We chose simple prophylaxis over Talmudic hair splitting. See Darnell v. Commonwealth, Ky.,

558 S. W. 2d 590, 596 (1977) (Lukowsky, J., dissenting). We perceive no reason to retreat from Whorton, supra.

The judgment is reversed and the cause is remanded to the Pulaski Circuit Court for further proceedings consistent herewith.

All concur except Aker, J., who did not sit.

Attorneys for Appellant:

JACK EMORY FARLEY, Public Defender
MARK POSNANSKY, Assistant Public Defender
Third Floor, State Office Building Annex
Frankfort, Kentucky 40601

Attorneys for Appellees:

HONORABLE ROBERT F. STEPHENS, Attorney General
MILES H. FRANKLIN, Assistant Attorney General
State Capitol
Frankfort, Kentucky 40601